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ABSTRACT

The purpose of this hearing is for the House Subcommittee on Employment Opportunities to gather evidence on H.R. 5055 and H.R. 6075, amending the Civil Rights Act of 1964 so as to prohibit sex discrimination on the basis of pregnancy. Although some observers stated their feeling that this was the original intent of the legislation anyway, a recent Supreme Court decision ("General Electric vs. Gilbert and IUE") stated the contrary. Thus the need was felt for additional legislation to be considered. Presented here is the first day's testimony, consisting of statements, summaries, letters and other supplemental materials from a variety of expert witnesses and interested persons on the subjects of sex discrimination, equal pay, disability benefits, employer responsibility and related concerns. (BP)

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ED 172127

LEGISLATION TO PROHIBIT SEX DISCRIMINATION ON THE BASIS OF PREGNANCY

HEARING

BEFORE THE

SUBCOMMITTEE ON
EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 5055 and H.R. 6075

TO AMEND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964
TO PROHIBIT SEX DISCRIMINATION ON THE BASIS OF
PREGNANCY

HEARING HELD IN WASHINGTON, D.C., APRIL 6, 1977

Printed for the use of the Committee on Education and Labor
CARL D. PERKINS, *Chairman*

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LEGISLATION TO PROHIBIT SEX DISCRIMINATION ON THE BASIS OF PREGNANCY

WEDNESDAY, APRIL 6, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
OF THE COMMITTEE ON EDUCATION AND LABOR,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:15 a.m., in room 2261, Rayburn House Office Building, Hon. Augustus F. Hawkins (chairman of the subcommittee) presiding.

Members present: Representatives Hawkins, Le Fante, Weiss, Sarasin and Pursell.

Staff present: Susan Grayson, staff director; Carole Schanzer, clerk and administrative assistant; and Richard Mosse, minority assistant counsel.

Mr. HAWKINS. The subcommittee is called to order.

This morning's hearing commences the Subcommittee on Employment Opportunities' consideration of legislation to prohibit discrimination on the basis of pregnancy. This legislation, H.R. 5055, would clearly indicate that the prohibition against sex discrimination in title VII of the Civil Rights Act includes a prohibition against employment-related discrimination on the basis of pregnancy, childbirth, and related conditions.

In my view, such a prohibition was clearly intended in title VII. Unfortunately, the Supreme Court in *General Electric* versus *Gilbert and IUE* decided otherwise this last December.

[Text of H.R. 5055 and H.R. 6075 follow:]

[H.R. 5055, 95th Cong., 1st Sess.]

A BILL, To amend title VII of the Civil Rights Act of 1964 to prohibit sex descrimination on basis of pregnancy

***Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That title VII of the Civil Rights Act of 1964 is amended as follows:**

Section 701 is amended by adding thereto a new subsection (k) as follows:

"(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise."

[H.R. 6075, 95th Cong., 1st Sess.]

A BILL, To amend title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title VII of the Civil Rights Act of 1964 is amended as follows:

SECTION 1. Section 701 is amended by adding thereto a new subsection (k) as follows:

"(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.".

SEC. 2. The amendment made by this Act shall be effective upon the date of enactment: *Provided,* That an employer who, either directly or through contributions to a fringe benefit fund or insurance program, is providing benefits under a fringe benefit program which is in violation of section 2000e of title 42, United States Code, and the following, as amended by this Act shall not, either directly or by failing to contribute adequately to the fringe benefit fund or insurance program, reduce the benefits or the compensation provided to any employee in order to comply with the provisions of section 2000e of title 42, United States Code, and the following, as amended by this Act.

Mr. HAWKINS. The hearing this morning will explore some of the issues raised in *Gilbert,* particularly the discriminatory impact of excluding pregnancy-related disabilities from employee benefit plans. We are concerned about the human as well as the actuarial considerations.

This is a most important civil rights issue. Therefore, we are attempting to hear from as many witnesses as possible this morning to obtain information on the legal, economic, labor relations, ethical, and medical implications of the proposed amendment.

I must request witnesses to briefly summarize their statements, and members, we hope, will limit their questioning wherever possible.

We have a long list of witnesses, some 20 in number. We are going to handle them through the panel operation. We have indicated that brevity is almost necessary, if we want to get through this long list of witnesses this afternoon. We will not, obviously, be discourteous, or try to foreclose any questioning that is justified.

We hope that we will have the cooperation of both the witnesses and the Members, and that we will hear from just as many witnesses as is possible.

Let me apologize to literally another 100 witnesses who wanted to testify this morning, including Members of the House, many of whom are coauthors with us on this particular proposal. We could not possibly hear from everyone. However, I hope that we will hear from as many viewpoints as is possible today.

The first panel will consist of Wendy Williams, professor of law, Georgetown Law School, Washington, D.C., Susan Deller Ross, American Civil Liberties Union, New York City; and Sherrie O'Steen, plaintiff in *General Electric* versus *Gilbert and IUE.*

With that introduction, we hope the witnesses will direct their attention, then, to a summary of their presentation.

On behalf of the committee, I welcome the witnesses at this time. Certainly, it seems to me that you are among the key witnesses that we have, and it is a pleasure to have you testify before the subcommittee.

Your prepared statements in their entirety will be entered in the record at this point, without objection.

[Statements referred to follow:]

Prepared statement of Wendy Williams, professor of law, Georgetown Law School, Washington, D.C.

My name is Wendy W. Williams. I am an Assistant Professor of Law at Georgetown University Law Center here in Washington. I am grateful for the opportunity to testify in favor of H.R. 5055. Since 1972, as attorney for the plaintiffs in _Geduldig_ v. _Aiello_, I have had the opportunity to acquaint myself in great depth with the causes and effects of discrimination because of pregnancy in the labor force. My investigation into this phenomenon has lead me to conclude that equality for women in the workplaces of this country is an unattainable goal so long as employers are free to make pregnancy the basis of unfavorable and irrational treatment of working women.

On the simplest level, this bill (which I will call "the _Gilbert_ bill") finds its justification in the observation of Justice Stevens, dissenting in _General Electric Co._ v. _Gilbert_. He said, "_By definition_. . . . a rule [treating pregnant women differently] discriminates on account of sex: for it is the capacity to become pregnant which primarily differentiates the female from the male." Yet, because our highest court has decided that pregnancy discrimination is not sex discrimination, either under the equal protection clause (in _Geduldig_ v. _Aiello_) or under Title VII (in Gilbert), it seems appropriate today to review in some detail why this simple perception finds support in both history and policy. It has been said that "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past." (Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

At the very core of the stereotypes which have resulted in irrational impediments to employment opportunity for women are assumptions about pregnancy - both its medical characteristics and physical effects, and, more broadly, assumptions about its implications for the role of women in society and in the labor force. Indeed, it is fair to say that most of the disadvantages imposed on women, in the workforce and elsewhere, derive from this central reality of the capacity of women to become pregnant and the real and supposed implications of this reality.

I. HISTORY

In 1908, the United States Supreme Court upheld "protective" labor laws for women workers a few years after rejecting similar protection for men, declaring that because woman is differentiated by her physical structure, the performance of maternal functions and her dependency on men from the male sex, "she is properly placed in a class by herself," for legislative purposes. (Muller v. Oregon, 208 U.S. 412). The court added that long hours of work, particularly if done standing, has injurious effects on the female body and "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." A companion view was that it was unseemly, indeed disgraceful, for wives to work. An author writing about women workers in 1916 stated:

> The American family standard has always been a bread-winning father, and a mother occupying herself with care of her children. Any deviation from this custom is cause for comment. Pride on the part of our native workmen serves to keep their wives out of the ranks of wage earners.

Thus, women participating in an American Institute of Banking convention in 1923 could be told that they were "merely temporary employees" in the nation's banks and businesses and that their goal should be to return home. The medical profession joined in, letting the popular view of women's maternal role shape scientific conclusions about women's health: In The Science of Health, A Reliable Family Physician, published around the turn of the century, the doctor-author concluded:

> "the platform of women's rights has not as yet been made to include as a plank the right to complete the natural sexual development--a right which implies a sufficient opportunity for the growth of the paries and the accessory reproductive organs . . . It is the unanimous experience of physicians that such cases of imperfect sexual development

> are usually found in girls with brilliant school records. The body can rarely discharge two important duties well at the same time. . . if the brain be worked continuously, the ovaries must be slighted.

Even Samuel Gompers, the father of the American Federation of Labor and a supporter of women's suffrage and equal pay for equal work, believed that the place of married women, particularly mothers, was in the home.

While these views sound quaint and antiquated today, history demonstrates that today's pregnancy policies are the direct descendants and heirs of employer policies born of those earlier views.

The notion that women belonged in the home as child bearers and tenders had several manifestations in the '20s and '30s. First, married women were often barred from employment altogether or dismissed when they became married. During the depression, whole cities campaigned against working married women and most state legislatures considered bills to restrict the employment of married women. A National Education Association study in 1930-31 revealed that 77 percent of all school systems surveyed refused to hire wives; sixty-three percent dismissed women teachers if they subsequently married. The feeling that they shouldn't really be in the labor force anyway, but should be home bearing children, or, if they were in the labor force, were not and should not be considered serious, permanent workers, made them the natural target in a time of job scarcity.

Second, the '20s saw the beginning of the fringe benefit movement. The idea was that fringe benefit programs would attract and hold good workers by enhancing the worker's sense of security and loyalty to the company, thus ultimately benefitting the employer as well as the employee. From its inception, there was evidence that in fringe benefits, as well in other terms and conditions of employment, the employers' view of women as marginal workers whose proper and expected role was wife and mother resulted in a limitation on the benefits made available to them. Women were excluded altogether from some employer fringe benefit programs. When, for example, the General Electric Company's sickness and accident insurance plan was altered from an employee supported to contributory plan, women employees were not invited to participate. The president of General Electric explained the exclusion by saying, "Frankly, our theory had been that women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company." Less drastic limitations, motivated by the same general views, included the exclusion of disabilities affecting women's generative organs and pregnancy-related disabilities from disability and medical insurance programs as well as the exclusion of women from eligibility for selected types of plans (such as life insurance) within the employers general fringe benefit programs, or an across-the-board percentage reduction of benefits to women. Given the employer assumption that women were going to be marginal workers in any event, there was no point in wasting benefits, provided for the purpose of promoting loyalty and increased production, on this unstable and unpromising group of employees.

If women were the expendable workers of the twenties and thirties, however, the Second World War, with its accompanying manpower shortage, made women workers essential to the war effort. As four and one half million women entered the war labor force, a reassessment of the policies and practices of employers was necessary. The War Manpower Commission issued a statement of policy on recruitment, training and employing of women workers which recommended, among other things, equal treatment of women workers in hiring, training and wages.

More to the point, a Children's Bureau study in late 1942 and early 1943 took a hard look at employer practices affecting women. In particular, the practice of firing women when they became pregnant was the subject of inquiry. The author of the study noted that while the reason often given for the practice was the protection of the mother and fetus, and fear of liability for miscarriage, "aesthetic and moral" qualms were often at the root of such practices. Employers expressed the view that it was "not nice" for obviously pregnant women to be working in a factory and that it had a "bad effect" on male workers, who made it a subject of frequent comment and were distracted from their work. As late as 1974, the Supreme Court noted in a footnote to a case challenging mandatory maternity leaves in the fourth and fifth months of pregnancy that the mandatory leave rule was inspired by the school district's desire to save pregnant teachers from embarrassment at the hands of giggling school children and to insulate the children from the sight of conspicuously pregnant women.

Indeed, the idea of leaves rather than outright termination of pregnant women constituted an improvement in the treatment of women and seems to have originated during the war, based on the recommendation of the Department of Labor. As we shall see, however, mandatory leave continued, in mitigated form, many of the hardships of outright termination.

The end of the war brought with it the wholesale termination of thousands of women workers without regard to seniority or job aspirations. The first to go were married women. And, for the most part, the prewar patterns of discrimination against women workers reasserted themselves.

By the time Title VII was passed in 1964, there had been little progress in upgrading the status of women in the labor force. This was true of pregnancy treatment as well as other aspects of employment. Forty percent of all employers still did not even provide unpaid maternity leaves -- women were simply fired. Among employers who did provide a leave, more than one half forced women onto leave before the seventh month of pregnancy.

Only six percent permitted women to use their sick leave for pregnancy-related illness or disability.

The impact of Title VII upon all aspects of employment discrimination against women, including discrimination because of pregnancy, was rather dramatic. By 1973, seventy-three percent of women workers received maternity leave accompanied by reemployment rights; twenty-six percent could use sick leave for pregnancy-related illness and disability. Now, in 1977, this progress is threatened by the Gilbert decision, and only the passage of the Gilbert bill can insure continued progress.

II. IMPACT OF PREGNANCY DISCRIMINATION

From the history, several things are apparent. One is that the common thread of justification running through most policies and practices that discriminated against women in the labor force rested ultimately on the capacity and fact of pregnancy and the roles, behavior patterns and mythologies surrounding it. Another is that because of pregnancy and motherhood, women were viewed as marginal workers not deserving of the emoluments and pay of "real" workers. The practices concerning pregnancy in particular arose not only out of the general attitudes described above, but also out of a sense of embarrassment and discomfort at the presence of obviously pregnant women in the workplace.

In a 1972 opinion, Judge Haynesworth of the Fourth Circuit Court of Appeals dismissed the argument of a school teacher, Susan Cohen, that it was unconstitutional to force her to leave her teaching job in the fifth month of pregnancy, with the following words, "No man-made law or regulation excludes males from [the experiences of pregnancy and motherhood] and no such laws can relieve females from all the burdens which naturally accompany the joys and blessings of motherhood."

With all due respect to Judge Haynesworth, it is precisely man-made laws and rules which create burdens for the working woman. The employer rule before the court in that case is a perfect illustration of the point. It was not the mandate of Mrs. Cohen's body, in its pregnant state, which caused Mrs. Cohen to be unable to continue working in the Cleveland School District. Rather, it was the employer rule which forced Mrs. Cohen, a healthy, able-bodied worker, to leave work simply because of the fact of her pregnancy.

What rides on the passage of the Gilbert bill? A closer look at the "man-made laws and regulations" which affect pregnant working women is in order.

The starting point for analysis is the fact that around 80 percent of all women become pregnant at some point in their worklives. Moreover, even women who do not actually become pregnant are, until they pass childbearing age, viewed by employers as among the potentially pregnant. Thus, all women are subject to the effects of the stereotype that women are marginal workers with the multifacited consequences this had for hiring, job assignment, promotion, pay, and fringe benefits.

The reported Title VII cases reveal the whole array of ways in which assumptions about pregnancy and the resulting pregnancy rules have cut deeply against equal employment opportunity for women.

Earlier cases illustrated that the assumption women would become pregnant was offered to justify refusal to hire or promote into certain positions. For example, in Cheatwood v. South Central Bell Telephone & Telegraph Company, the employer refused to consider women for the job of commercial representative in part because women might become pregnant and pregnant women, according to the employer, could not perform the job in question. A more sophisticated rendition of the argument was made through the employer's expert-physician, who testified that women could not lift the weights involved in the job because of the physical and hormonal makeup of women associated with the childbearing capacity. And in Hodgson v. National Bank of Sioux City, women were excluded from management training because the bank believed they would become wives and mothers and leave the company. The cases also reveal numerous examples of termination of pregnant women. In one extreme (and very recent) case, a woman employee was told by her employer that she would have to quit work when she began to "show" because at that point she would no longer be able to comply with the employer's dress code.

Even when a woman is not terminated when she becomes pregnant, but is simply placed on mandatory unpaid maternity leave, the consequences can be serious indeed. In the best of circumstances, mandatory leave is accompanied by a guarantee of reinstatement in the employee's previous job without loss of benefits. But often, mandatory leaves are followed by loss of previous position, lower pay, and loss of seniority and other benefits. In short, the women placed on mandatory leave, like the woman who is terminated for pregnancy, often must begin again as a new hire.

The cases are replete with examples. In School District #1 v. Nilson, for example, the school district required resignation of school teachers who became pregnant prior to earning tenure. For plaintiff Nilson, who became pregnant after two and one half years of teaching, this rule meant that she must seek to be rehired after the birth of her child and begin acquiring anew the full three years which were the prerequisite for tenure.

In Wetzel v. Liberty Mutual Ins. Co., the woman fortunate enough to be rehired after birth of a child lost all credit for previous service to the company for purpose of fringe benefit eligibility. Liberty Mutual employees became eligible for temporary disability benefits after three months with the company and for long term disability benefits after five years. Under the employer pregnancy rules, a woman employee with ten years service to the company and eligible under both plans, would, after the maternity leave, have to reacquire the right to temporary and long term disability as if she had never worked for the company.

Some of the consequences of maternity leaves are carried forward over the entire worklife of the employee. Among the benefits of which women are typically stripped as a result of maternity leave are accrued retirement benefits. The woman who took a pregnancy leave after a number of years with the company would, at the end of her worklife, find that her level of retirement benefits did not reflect her actual years of service to the company, and, sometimes, that her retirement date was postponed as well.

Loss of seniority is another deprivation with permanent effects. Seniority is often the basis for eligibility for certain benefits, such as vacation and sick leave. While the loss of these benefits has a temporary impact, the loss of competitive, as opposed to benefit, seniority may never be made up. Competitive seniority allows senior employees to outbid junior employees for more desirable jobs and for promotions. It also enables the senior employee to resist layoffs under seniority systems which provide that the last hired is the first to be fired. In Satty v. Nashville Gas, a Sixth Circuit case, the loss of seniority meant that Nora Satty ended up with no job at all. She was permitted to return to Nashville Gas after the birth of her child but only as a temporary employee. She bid upon three permanent jobs, each of which she would have gotten had she retained her earned, pre-leave seniority. Without that seniority, she lost each of the jobs to other employees, and, when her temporary job ended, was out of work. In _Zichy_ v. _City of Philadelphia_, the loss of seniority to the woman placed on leave meant ineligibility for promotional examinations upon her return. Employer rules such as those in _Satty_ and _Zichy_ (and these rules are typical) mean that even those women fortunate enough to remain on the payroll after their return from mandatory leaves lose months and sometimes years of seniority, placing them permanently behind their rightful place in the promotion ladders and on the pay scales of the company.

Mandatory leave is also often accompanied by the immediate termination of other benefits. One of the _Gilbert_ plaintiffs, Emma Furch, lost her baby shortly after the commencement of her leave. Two weeks later she suffered a pulmonary embolism unrelated to the pregnancy. The company denied her claim for disability payments for the embolism on the ground that her forced pregnancy leave severed her eligibility under General Electric's disability plan. Had she been separated from work for other reasons -- such as a work stoppage, personal leave or a non-pregnancy related disability -- the plan would have covered the embolism.

Another significant feature of mandatory maternity leaves is that they are unpaid leaves. Until recently, the able-bodied woman placed on forced leave was not eligible for unemployment benefits although she was able and available for work. When she did become disabled and could not work, she was not eligible to draw upon her company sick leave or disability pay programs.

Unpaid maternity leave means forced loss of earning power for the entire period of the leave at a time when expenses are increased by the addition of the new family member. Moreover, as mentioned earlier, most employer insurance policies do not cover hospitalization costs for childbirth to the full extent hospitalization for other reasons is covered. Thus, the loss of income is compounded by the added expenses of the hospitalization for childbirth. Even in the most favorable of situations, the two income family, this means a reduction in standard of living. For some women the consequences are more dramatic. Sherrie O'Steen, one of the plaintiffs in the Gilbert case, found herself unable to provide for herself, a two year old child and her new infant. Her inability to pay utility bills resulted in the termination of her utility service. Finally, she was forced to resort to welfare for survival.

The contrast between the consequences of forced maternity leave and treating pregnancy as a disability under the Philadelphia sick leave program was summarized in Zichy as follows:

> When taking sick leave, a city employee continues to earn his or her normal salary and to accrue seniority, does not lose the privilege of taking promotional examinations for the time out, has the time credited for service and will receive the same raises as other employees in his or her classification who are not on sick leave. In addition, the employee continues to accumulate sick leave while on leave, will suffer no adverse effect on promotions, will resume the same position held prior to the commencement of such sick leave upon return, and will have no change in anniversary date of employment, pension plan, vacation time, and other fringe benefits as a result of using the sick leave.

Of course, the woman placed on mandatory maternity leave by the City of Philadelphia had none of these protections.

Thus far, I have focussed on the difference between mandatory maternity leave and disability pay or sick leave for childbirth-disability. It should be emphasized that refusal to allow women to rely upon sick leave or disability pay and full medical coverage is not limited to the disabilities accompanying normal childbirth. Rather, it is often the case that these benefits are denied for any pregnancy-related disability, including complications of pregnancy, miscarriage, and disabilities which are common to the non-pregnant but are triggered or exacerbated by pregnancy. The General Electric disability plan, held non-discriminatory by the Supreme Court, is one example of such a total exclusion plan.

A necessary side affect of these policies is the burden placed upon the woman's choice to bear a child, a right the Supreme Court has recognized to be of constitutional magnitude. The district court in Gilbert dealt directly with this effect in the context of the exclusion of pregnancy disabilities from General Electric's disability plan:

> While it is true that women may, under certain conditions, resort to an abortion . . . it cannot be reasonably argued that Congress in its enactment of Title VII ever intended that an intended beneficiary of that Act forego a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of benefits of employment free from discrimination.

Thus, employer pregnancy rules not only affect the status of women workers in pervasive and permanent ways, but they can also impose on poor women the choice between employment with full earned status and benefits on the one hand and their right to procreate on the other.

The examples I have given reveal the tangible and measurable impacts of employer pregnancy rules and policies. The intangible effects of employer pregnancy policies on the women workers' psyche, motivation and commitment are incalculable. At some level, women do understand the treatment of pregnancy as a message to women workers: "You have chosen the woman's role of pregnancy and motherhood and have thereby forfeited your place and rights in the workforce. Go home where you belong." Thus is the prophecy that women are marginal workers with no lasting commitment to the workforce reinforced, and the prophecy becomes self-fulfilling.

The final irony of this web of workforce disabilities placed upon pregnant women is that American working women, alone among working women in the industrialized countries of the world, face childbirth and the accompanying inability to work unprotected by an income continuation plan. All countries of Western and Eastern Europe have by law provided income protection to disabled workers including pregnant workers. Similarly, all but five of the countries in the western hemisphere provide such protection. In this country, worker rights and benefits have by and large not been a subject of social legislation, but instead have been left to management and labor in the private sector to work out through the mechanisms provided by our labor laws. Indeed, one management writer, referring to employer fringe benefit programs, has stated, "It is now meaningful to label this web of employee benefit plans 'the corporate social security system.'" I submit that it is wholly appropriate, and, indeed, in light of the abdication of responsibility by the private sector, essential, for Congress to mandate full job equality for women workers by ensuring that pregnancy discrimination, like other forms of sex discrimination, will not escape judicial scrutiny. Passage of the Gilbert bill would accomplish this goal.

III. THE COST JUSTIFICATION

A study of the labor force history of women leads overwhelmingly to one conclusion: pregnancy--potential and actual--is the core from which radiate almost all the multitude of images, suppositions, predictions, moral convictions, social preferences and stereotypes which form the justification for different and less favorable treatment of women in the workforce. It is not surprising, therefore, that as barriers to equal employment opportunity for women have gradually fallen one by one in the wake of the passage of Title VII, the disputed issues have narrowed until there is one final and decisive battleground--the treatment of pregnancy itself. It is also not surprising that the most hotly contested of the pregnancy issues is the one that involves a potential cost to employers--coverage of pregnancy-related disabilities in sick leave and disability benefit programs.

While others will delve more deeply into the cost justification now offered by employers for the pregnancy exclusion, I would like to make a few general observations.

First, history demonstrates that cost was not the reason for excluding pregnancy disabilities from disability and sick leave coverage. Rather, the historical notion of women's proper place and role are the origins of the exclusion. Recall the statement of General Electric Company's president explaining the exclusion of women from the disability program: "Frankly, our theory had been that women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company." The point is emphasized by the wild cost estimates companies began to come up with when their pregnancy policies were challenged under Title VII. American Telephone and Telegraph Company, the single largest private employer of women, claimed, for example, that pregnancy disability coverage would cost an additional thirty-nine and one half million dollars in a single year. But this figure was based on the supposition that pregnancy disabilities would have an average duration of five and one half months. This figure is decidedly out of line with medical realities, since doctors indicate that disabilities arising from childbirth last from three to eight weeks. The highly inflated estimates offered by employers defending litigation were never the product of careful cost analysis based on sound actuarial principles. One actuary in the General Electric case admitted under oath that the problem of estimating costs was that there was no data and experience upon which to base reasonable estimates.

The companies which have, in very recent years, sought to comply with the EEOC guidelines on pregnancy have discovered the truth--while coverage of pregnancy disabilities does cost additional money (as would the inclusion of any major disability previously excluded), the cost is moderate and managable. Indeed, the Federal Reserve Bank of Boston found that treating pregnancy disabilities the same as all other disabilities would add between $.004 and $.01 to the hourly wage of its employees, representing an increased labor cost of between 1/10 and 2/10 of one percent. In the context of general yearly wage increases of around 18 cents per hour, the cost of covering pregnancy is minor indeed.

Second, in both Geduldig and Gilbert, the Supreme Court was apparently impressed with figures submitted by defendants and amici indicating that women account for more than their "fair share" of temporary disability benefits even when the programs exclude pregnancy disabilities. And, indeed, it appears to be true that women as a group draw more heavily on temporary disability insurance programs in most companies than men do. But this is only the beginning of the inquiry.

It must first be observed that temporary disability programs are only one component in more comprehensive schemes of employee disability protection. These schemes also include worker's compensation for work-related injury and illness, sick leave, and permanent or long-term disability programs. While women may account for more sick leave and temporary disability days, men constitute a heavier drain on worker's compensation and long-term disability programs. Indeed, H.E.W. studies of time lost from work per year between 1963 and 1972--a calculation which includes days lost due to pregnancy disability--confirms this important point. Sex differences in days lost from work are minor indeed. In some of these years, women lost more time from work than men; in others, men lost more time from work. In each year the difference in time missed between men and women was less than a single day.

A second, and at least as significant observation, is that *disability rates decline as wages rise*. Low income workers--regardless of sex--show a significantly higher disability rate than high income workers. While *family* income studies also show this inverse relationship between wages and disability rates, the wages of *individuals* reveal a more clear and consistent inverse relationship. Whether this is because family income is less influential in employee health than the types of jobs performed by individuals who are low income workers, or because of the psychological effects of holding less rewarding and less responsible jobs, is not known. What *is* clear is that individual income, not sex, is the best predictor of disability rates.

Since full time women workers earn, on the average, two thirds of what men workers earn in this country, it follows that women as a group account for more short term disability days than men do. A similar pattern, as one would predict, is apparent for black and other minority workers as compared to white workers.

Under the circumstances, it may be worth asking those companies whose representatives testify that women already receive a disproportionate share of disability payments what their average male and female wage is. It is probable that such companies do not have a sex-integrated and equal workforce.

These hearings may also present the opportunity to clear up another mystery; namely, why it is that insurance companies oppose coverage for pregnancy-related disabilities. At first blush, their opposition would appear incongruous in light of the fact that adding disabilities means added income for insurers. It has been suggested that insurance companies are opposed to including pregnancy disabilities not as insurers, but as *employers* who adhere to the traditional assumptions and stereotypes about women. A look at the insurance industry's male-female employment patterns suggests that this may be the case. Indeed, the employment practices of insurance companies have been a particular cause of concern to those pursuing the goal of equal employment opportunity for women. The record in the case of *Wetzel v. Liberty Mutual Insurance Company* reveals a typical pattern. Women at Liberty Mutual were totally excluded from the entry level job of claims adjuster, a position at the bottom rung of the company's promotional ladder. By virtue of their exclusion from the job of claims adjuster, women were thereby excluded from promotions. Liberty Mutual also terminated women who became pregnant and stripped them of previously acquired benefits if they were rehired after childbirth. And all women employees were excluded altogether from eligibility for certain life insurance programs.

There is one final and important point to be made about the employers' cost justification. One of the fundamental principles of Title VII is that women should be treated not on the basis of characteristics generally attributed to their sex, but rather on an individual basis. Thus, a physically strong woman cannot be excluded from a job requiring heavy lifting because the *average* woman is too small and too weak to do the job, without violating Title VII.

Justice Renquist, writing for the majority in *Gilbert*, abandons this critical principle. His view is that as long as women *as a group* already receive their share or more of paid temporary disability days, the exclusion of pregnancy disabilities from coverage does not violate Title VII. Extending this argument, he suggests that, for purposes of analysis, disability coverage should be considered in terms of its monetary value and viewed simply as an increment to wages. So viewed, men and women are receiving equal treatment because the value of coverage to the two groups, *as groups*, is similar, even though pregnancy is excluded.

This approach to the issue is dangerous to the principles of Title VII and job equality for two (related) reasons. First, it is inappropriate to convert disability fringe benefits to a monetary value and treat them as wages for purposes of analysis. They are not wages. Disability plans are sought and bargained for because they provide security against the risk of unpredictable wage loss due to disability, should that disability occur. Second, and concommitantly, to assign a monetary value and treat disability coverage as an addition to wages allows one, as it allowed the court, to bypass without analyzing the true discriminatory nature of the pregnancy disability exclusion.

Treating the disability program as part of wages, Justice Renquist was able to view all workers as receiving an an equal "raise" in their salaries. If, instead, the disability plan is viewed in terms of its purpose--job security and protection against unexpected loss of income due to disability--men are protected against all risks of income loss due to disability, while women are not, since, if a woman's disability is in any way connected with pregnancy, she faces a period of non-protection and income loss. The fact, in Gilbert, that women on the average will draw more upon the disability income protection plan if pregnancy-disabilities are included, overlooks the essential point that there is great variation among individual men and women in the number and duration of disabilities each suffers. The woman who is never disabled and the woman who is frequently disabled are treated alike and distinquished as a class from men, who themselves represent the whole spectrum from healthy to disabled. And where a man and woman, in the same job, earning the same pay, each suffers one disability of the same duration during their worklife with the company, and the woman's disability is due to a miscarriage, complication of pregnancy or is in some other way pregnancy-related, the man will receive partial income replacement under the company disability program but the woman will not.

Surely, such a result should not be permitted under Title VII, particularly where companies, joined by the insurance industry, have sought to justify such results by all-to-easy sex-based generalizations rather than looking to the real causes of higher disability incidence rates.

CONCLUSION

This bill to amend Title VII by making it clear that pregnancy discrimination is within the definition of sex discrimination is the simplist and surest way to guarantee that the great mandate of Title VII will be realized for working women. It makes explicit what the EEOC and every federal court except the Supreme Court believed was the intent of the Congress when it passed the Act in 1964 and extended its provisions in 1972. This bill will make pregnancy-based discriminations subject to the same scrutiny on the same terms as other acts of sex discrimination, and of course, provides the employer with the same defense, if proven, that the Act recognizes for other forms of sex discrimination.

It is obvious, but perhaps worth noting, that while _failure_ to pass this bill will have tremendous consequences for working women, _passage_ of the bill imposes no new, unfamiliar or untried legal burdens upon employers or legal principles upon the courts. Until December 8, 1976, when the Supreme Court handed down the

Gilbert decision, the federal courts ably handled and resolved the pregnancy issues. This bill, when it becomes law, will simply enable the courts to continue that task according to the familiar and workable principles which they have developed over the past few years. I urge its passage.

Testimony of Susan Deller Ross, On Behalf of
the Campaign to End Discrimination Against
Pregnant Workers, Before the Subcommittee on
Employment Opportunities of the House
Committee on Education and Labor, On H.R. 5055

April 6, 1977

Mr. Chairman, thank you for giving me the opportunity to testify before this subcommittee. I am appearing today on behalf of the Campaign to End Discrimination Against Pregnant Workers. I am Co-Chair of the Campaign, and am also a staff attorney with the American Civil Liberties Union. The other Co-Chair is Ms. Ruth Weyand, an attorney with the International Union of Electrical, Radio and Machine Workers.

I am pleased to testify today in support of H.R. 5055 on behalf of the Campaign. The Campaign is a broad-based coalition of women's rights organizations, civil rights groups, labor unions, and other public-interest groups, formed one week after the Supreme Court handed down its decision in General Electric Company v. Gilbert. These groups were united by one concern -- the realization of Gilbert's enormous potential for harm in eradicating the rights women workers had fought so hard to achieve in the thirteen years since Congress enacted Title VII of the Civil Rights Act of 1964.

In the Gilbert decision the Supreme Court held that an employer policy of singling out pregnant workers for less favorable treatment than all other workers was not, on its face, sex discrimination. The specific context of the case was General Electric's policy of denying temporary disability payments to disabled pregnant workers. Since no pregnant men were given such payments, the Court reasoned that it was not sex discrimination to deny the benefits to pregnant women. The Court's logic could be extended to any disfavorable treatment of pregnant workers. And since most women workers do bear children at some point in their working lives, this one decision could thus be used to justify a whole complex of discriminatory employment practices designed to insure that women worker's role in the market place be confined to low-paying, dead-end jobs.

Professor Williams has just testified on the historical origins of such policies, and the wide variety of discriminatory pregnancy policies in existence today. Employers routinely fire pregnant workers, refuse to hire them, strip them of seniority rights, and deny them sick leave and medical benefits given other workers. Such policies have a lifetime impact on women's careers. Together, they add up to one basic fact: employers use women's role as childbearer as the central justification of and support for discrimination against women workers. Thus, discrimination against women workers cannot be eradicated unless the root discrimination, based on pregnancy and childbirth, is also eliminated. By specifically approving this core discrimination, the Supreme Court has virtually nullified the sex discrimination provisions of Title VII. If the Gilbert decision stands, the Act is dead for women workers -- whatever their race or national origin.

The Campaign supports H.R. 5055 because it will restore Title VII as an effective tool in eradicating sex discrimination in employment. It will reinstate what we believe Congress always intended -- that all sex discrimination be eliminated, root and branch, from the market place, especially including discrimination focussed on that one condition which makes women different from men -- their childbearing capacity.

The proposed law does this through two simple concepts. First, it makes clear that sex discrimination necessarily includes discrimination based on pregnancy, childbirth, and related medical conditions. Second, it defines the appropriate standard for eliminating such discrimination, by providing that pregnant workers who are able to work shall be treated the same as other able workers, and that pregnant workers who are unable to work shall be treated the same as other disabled workers.

The first concept seems self-evident. Classifications based on pregnancy and childbirth affect women and only women. Indeed, pregnancy and childbirth are the result of a physical structure and biological potential which, more than any other characteristic, define a person as a member of the female sex. As Justice Brennan's Gilbert dissent stated: "it offends commonsense to suggest...that a classification revolving around pregnancy is not, at the minimum, strongly 'sex-related.'"

The second concept -- equal treatment for those who are similar in their ability or inability to work -- is necessary to end the whipsaw effect pregnant workers are subjected to. On the one hand, they are told early in their pregnancies, when they are perfectly willing and able to work, that they are disabled and must stay home on long unpaid leaves of absence, sacrificing pay and career opportunities given other able workers. On the other hand, when they are actually hospitalized or are recuperating from delivery, they are told that they aren't disabled after all and are thus denied disability and medical benefits given routinely to other disabled workers.

The point here is that no conclusions about a woman's medical ability to work can be drawn from the fact of pregnancy *per se*. Most women are able to work through most of their pregnancies (although ~~[illegible]~~ less than 5% do suffer some complications that prevent them from working). Those pregnant women who are able to work should be allowed to work like all other able workers. Conversely, all pregnant women have some period of medical disability, beginning in a normal pregnancy with labor itself and continuing through the normal recuperation period of 3 to 8 weeks after childbirth. These disabled women should likewise be given the same fringe benefits all other medically disabled workers get.

In adopting the standard of equal treatment for those who are similar in their ability or inability to work, H.R. 5055 incorporates the theory of the EEOC pregnancy guidelines which the Supreme Court declined to follow. By passing this bill, Congress would thus be affirming that the EEOC properly interpreted Title VII, and that the Supreme Court erred in failing to give the guidelines their customary "great deference."

The Campaign believes that the EEOC exhibited both great leadership and an in-depth understanding of how best to eradicate sex discrimination from the market place when it enacted the pregnancy guidelines in 1972. This was demonstrated convincingly by the virtual unanimity with which the guidelines were followed. It is well known that all six federal courts of appeals to consider the issue followed the guidelines, as did 18 federal district courts. What is perhaps less well known is that the vast majority of state human rights agencies also followed the EEOC's lead, often adopting the guidelines word for word as their own. The United States Department of Health, Education and Welfare also adopted pregnancy guidelines, interpreting Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq. (1974), which are virtually identical to the EEOC position. See Section 86.57(c), 40 Fed. Reg. 24144 (1975). Finally, the HEW guidelines were placedbefore Congress for a forty-five day period during which hearings were held and the content of the regulations thoroughly canvassed. By permitting the Title IX regulations to become effective without change, Congress itself plainly indicated that the EEOC had properly interpreted Congressional intent in passing Title VII.

The correctness of the EEOC standard is further demonstrated by the number of states which have refused to follow the Supreme Court's lead in interpreting state human rights laws virtually identical to Title VII. In a case raising the same issue as Gilbert, New York State's highest court, the prestigious Court of Appeals, declined to follow the Supreme Court's holding, politely noting that it was "instructive," but "not binding," without further discussion. Through their state human rights agencies, several other states have taken the same position, including the District of Columbia, Kansas, Michigan, New Jersey, Pennsylvania, South Dakota, and Wisconsin.

These state rulings suggest another reason for passing H.R. 5055: to provide one uniform national policy for dealing with discrimination against pregnant workers. It seems likely that many states with guidelines modeled on the EEOC standard will follow the lead of those states which have explicitly indicated that they will not follow the Gilbert decision. In addition, several states provide by statute for temporary disability coverage for pregnant workers under state disability benefits laws, including California, Hawaii, New Jersey, and Rhode Island. Three state statutes explicitly prohibit discrimination on the basis of pregnancy (Alaska, Connecticut, and Montana). The combined effect of all these state laws, regulations, and court rulings is to leave at least 14 states, including the major industrial states of California, Connecticut, Michigan, New Jersey, New York, Pennsylvania, and Wisconsin, requiring employers to provide the temporary disability payments to disabled pregnant workers which the Supreme Court ruled were not required by Title VII. Such disparate treatment of women workers by state of employment is clearly arbitrary and unfair to the women (who are denied benefits in the states with no coverage and to) ~~concerned, and also to~~ the companies in ~~those~~ the other states. A uniform federal standard requiring all employers throughout the United States to observe the higher standard is essential.

The Campaign also supports the clarifying amendment to H.R. 5055, which provides in essence that employers may not lower benefits or compensation in order to comply with Title VII, as it is amended by this bill. This is a standard provision of anti-discrimination law, explicitly provided for in the Equal Pay Act, and routinely required in Title VII case law. We believe that a specific provision to prohibit reduction of benefits or compensation is needed because some employers have threatened to deprive everyone of disability benefits rather then provide them to disabled pregnant workers. Obviously, the purpose of anti-discrimination laws is not to lower the living standards of all workers but rather to improve the treatment of those who have been discriminated against. The clarifying amendment would guarantee this result.

In my testimony so far, I have focussed on the importance of passing H.R. 5055 in order to guarantee equal employment opportunity for women workers. But far more is at stake than the fate of women workers. The Gilbert decision contained several ominous signals for all classes protected by Title VII, and it is important for Congress to send a direct signal back to the Supreme Court that it will not tolerate any erosion of Title VII. Quick passage of H.R. 5055 would convey that message.

I would like to outline very briefly some of the more troubling arguments in the Gilbert opinion. First, the Supreme Court announced that it would examine and rely upon "court decisions construing the Equal Protection Clause of the Fourteenth Amendment," to determine what Congress intended in Title VII's prohibition on "discrimination." This idea is patently ridiculous as to the sex discrimination provisions of Title VII, for if Congress meant to incorporate equal protection doctrine into Title VII in 1964, it intended to do absolutely nothing as to sex discrimination. In 1964, the Supreme Court had an unbroken record of upholding the most blatantly sex discriminatory practices under the Fourteenth Amendment, including absolute prohibitions on women working as lawyers and bartenders. But even as to minorities, reliance on current equal protection doctrine could be used to undermine Title VII very seriously, by incorporating the necessity to prove intent to discriminate. Compare Griggs v. Duke Power Company, 401 U.S. 424 (1971), with Washington v. Davis, 426 U.S. 229 (1976).

Second, the Supreme Court refused to follow the EEOC guidelines in part because they were not a contemporaneous interpretation of Title VII. This idea is troubling not only because it leaves the agency no time to develop an understanding of how discrimination operates, but also because many of the EEOC guidelines have changed over time as the agency gained more in-depth understanding of the problem under consideration. Indeed, the testing guidelines considered in Griggs were first issued in 1966 and then modified in 1970. Moreover, Congress itself has recognized that the process of interpretation of Title VII is necessarily an evolutionary one. The Report of the Senate Committee on Labor and Public Welfare recommending passage of amendments to strengthen Title VII enforcement summed up this perception as follows:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization .... Experience has shown this view to be false.

> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs .... In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful.

S. Rep. No. 92-415, 92d Cong., 1st Sess., 5 (1971). See also H.R. Rep. No. 92-238, 92d Cong., 2d Sess., 8 (1971).

Finally, the Court's interpretation of the Bennett Amendment of Section 703(h) of Title VII was an extreme example of result-oriented analysis of statutory language. It ignored the plain meaning of the Bennett Amendment, which simply incorporates Equal Pay Act exceptions into Title VII. See Statement of Senator Dirksen, 110 Cong. Rec. 13647 (1964). To reach the result it wanted, the Court relied instead on a clearly erroneous statement of Senator Humphrey, who asserted after passage of the amendment that the Equal Pay Act allows employers to retire women earlier than men - a statement which is patently untrue, since the Equal Pay Act does not purport to deal with anything other than wage discrimination. See Manhart v. City of Los Angeles, ____ F.2d ____, 13 FEP Cases 1625, 1631-1632 (9th Cir. 1976). Based on Senator Humphrey's erroneous views, the Court then concluded that Section 703(h) allows the pregnancy-based discrimination at issue in Gilbert.

The Campaign believes that nothing in the explicit language or relevant legislative history of Section 703(h) supports this view.

Nevertheless, the Court's strained, result-oriented analysis makes necessary the proviso in H.R. 5055 that "nothing in section 703(h) of this title shall be interpreted to permit [sex discrimination based on pregnancy, childbirth, or related medical conditions].

In sum, then, the Gilbert decision presents enormous potential for undermining the effective enforcement of Title VII for all protected classes -- both women and minority groups. The Campaign urges quick passage of H.R. 5055, with strong supporting Committee reports repudiating the result-oriented analysis of that decision and its apparent attempt to undermine Title VII. Both are needed in order to guarantee that Title VII does not become a meaningless gesture to workers who have long been denied a fair chance to participate fully in the nation's commerce.

STATEMENT OF WENDY WILLIAMS, PROFESSOR OF LAW, GEORGETOWN LAW SCHOOL, GEORGETOWN UNIVERSITY, WASHINGTON, D.C.

Ms. WILLIAMS. Thank you, Mr. Chairman.

My name is Wendy W. Williams. I am an assistant professor of law at Georgetown University Law Center here in Washington, D.C.

I am grateful for this opportunity to testify in favor of H.R. 5055, the bill to overrule the Supreme Court's opinion in *Gilbert* versus *General Electric*. In my written submission to this committee, I described in some detail the history of the treatment of pregnancy by employers in this country, going back as far as 1900 and before the turn of the century.

From that history, several things are apparent. One is that the common thread of justification running through all the policies and practices that discriminate against women in the labor force rested ultimately on one fact: The capacity and reality of pregnancy.

Some of the assumptions about pregnancy and its implications for the role of women, and the behavior of women, led to the view that women were marginal workers, not really deserving of the emoluments and pay of real workers.

The practices concerning pregnancy, in particular, arose not only out of general attitudes about women's place in the workforce but also from a sense of embarrassment and discomfort at their presence as pregnant women workers.

What rides on the passage of this Gilbert bill? I think, a closer look at the policies and practices which affect pregnant working women is in order. The starting point for analysis is the fact that about 80 percent of all women do get pregnant in the course of their worklife. Even the women who do not actually get pregnant are, until they pass childbearing age, viewed by employers among the potentially pregnant. Thus, all women are subject to the effects of the stereotype that all women are marginal workers with all the multifaceted consequences for hiring, promotion, job assignments, and fringe benefits.

Reported title VII cases reveal the whole array of ways in which assumptions about pregnancy and the resulting pregnancy rules have cut deeply against equal opportunity for employment for women.

First: The cases illustrate the assumption that women will become pregnant and that this is offered as a justification for refusal to hire women at all, or to promote them into certain positions.

One example is a case called *Cheatwood* versus *South Central Bell Telephone and Telegraph Co.* In that case the employer refused to consider women for the job of commercial representative, in part, because women might get pregnant and the employer thought that pregnant women could not fill the job properly.

Another example is *Hodgson* versus *National Bank of Sioux City*, there, women were excluded from the management training program because the bank believed that they would get married and leave the company. They, therefore, did not have management potential.

A still common practice with regard to pregnancy is the termination of women who become pregnant on the job, or the placement of these women in the unpaid force, or maternity leave for significant periods of time.

Termination, of course, is a very serious setback for working women. Mandatory leave, in the best of cirmumstances, is accompanied by a guarantee of reinstatement in the employee's former job without loss of benefits. But often even mandatory leaves are followed by loss of previous position, lower pay, loss of seniority and other benefits.

In short, the women placed on mandatory leave, like the woman who is terminated for pregnancy, often must begin again, after pregnancy, in the same position as if she were a new hire by the company.

The cases are replete with examples. To give you just one, in a case called *School District No. 1* versus *Nilson*, the school district required the registration of nontenure teachers who became pregnant. For plaintiff Nilson who became pregnant after 2 years of teaching, this meant that she would have to seek rehire after she gave birth to her child, and begin requiring the 3 years necessary to acquire tenure all over again, thereby losing 2½ years of her worklife.

Some of the consequences of forced maternity leave are carried forward over the entire worklife of working women. Among the benefits of which women are typically stripped as a consequence of mandatory maternity leave are accrued retirement benefits. So the women placed on a forced leave after a number of years with a company will, at the end of her worklife, find that her level of retirement benefits does not reflect her actual years of service to the company and, sometimes, that her retirement date is postponed as well.

Loss of seniority is another deprivation with permanent effects on the working women. Seniority allows senior employees to outbid junior employees for more desirable jobs and for promotions. It can also be used as a basis for permitting employees to qualify for promotion examinations. Finally, and most importantly, it enables the senior employees to resist layoffs under seniority systems which provide that the last hired is the first to go.

So the consequences of loss previously earned seniority are very significant. The cases that illustrate the problems, one is *Satty* versus *Nashville Gas*, which the U.S. Supreme Court has decided to review and will be hearing in the fall.

In that case, Nora Satty, after her forced leave, was permitted to come back as a temporary employee. She bid on three permanent jobs, each of which she would have gotten if she had been able to use her earned preleave seniority. Without that seniority she lost each of the jobs to other employees, and when her temporary job ended she was unemployed.

In sum, women who are terminated or placed on mandatory maternity leave may lose months and even years of earned seniority, placing them permanently behind their rightful place in the promotion ladders and pay scales of the companies they work for.

Another significant feature of mandatory maternity leaves is that they are unpaid leaves. Until recently, the ablebodied woman placed on a forced leave were not eligible for unemployment insurance, even though she was available and able. When she became disabled and could not work, of course, she was not eligible to draw upon her company's sick leave or disability program.

Unpaid maternity leave means forced loss of earnings for the entire period of the leave, at a time when expenses are increased by the addition of a new family member. Also, because most employers' insurance policies do not cover hospitalization costs for childbirth, the loss of income is compounded by substantial medical bills.

Even in the most favorable of situations, the two-income family, this means a reduction in the standard of living. For women not so fortunate, the consequences are far more dramatic. Sherrie O'Steen, one of the complainants in the *Gilbert* case, is here with us today, and will talk about what those consequences were for her.

Finally, it should be emphasized that refusal to allow women to rely on sick leave or disability pay is not limited to the disabilities which accompany childbirth. It is often the case that benefits are denied for any pregnancy related disabilities, including complications of pregnancy, miscarriage and disabilities which are common to the nonpregnant that are triggered or exacerbated by pregnancy. Diabetes is one example.

The General Electric disability plan held nondiscriminatory by the Supreme Court is one example of such a total exclusion plan. Unnecessary side-effect of these punitive pregnancy policies is the burden put on the women's choice to bear a child. For these women, these policies force a choice between employment with full status and benefits, and the right to procreate on the other.

As one judge noted, it cannot be reasonably argued that Congress in its enactment of title VII ever intended that an intended beneficiary of the act forego a fundamental right, such as a woman's right to bear children as a condition precedent to the enjoyment of benefits of employment free from discrimination.

One final irony in this whole picture is that this web of disadvantages placed upon the shoulders of the pregnant women, working women in the United States is that the American working woman, almost alone among working women in the industrialized countries, is faced with disability arising from childbirth with no income protection. All countries in Eastern and Western Europe have, by law, provided income protection to disabled workers including pregnant workers. Similarly, all but five of the countries in the western hemisphere have so provided.

Passage of the *Gilbert* bill would provide a tool for the treatment of American women into line with the more enlightened work practices.

I cannot leave the subject, really, without—briefly addressing the controversy about the costs of providing this coverage. Others will delve more deeply into this, but I would like to make a few observations which are elaborated more fully in my written submission to the committee.

First, and most importantly, history demonstrates that cost was not in any way the reason for excluding pregnancy disabilities from disability and sick leave coverage. Rather, the historical notion of women's proper place and role are the origins of the exclusion, as my written testimony indicates.

The cost argument is an attempt to find an acceptable and neutral explanation for an exclusion rooted in unacceptable stereotype and assumptions.

Second: The companies argue that women already account for more than their fair share of the disability benefits, even when pregnancy is excluded. The Supreme Court was impressed by this argument both in *Aiello* and the *Gilbert* case, but this statement is dangerous and extremely misleading for two reasons.

First: Temporary disability programs are only one component of more comprehensive schemes of disability protection. These schemes include, in addition to temporary disability protection, long-term disability protection, sick leave, and workers' compensation.

While the women account for more of the sick leave and temporary disability days; men account for more of the workers' compensation and long-term disability days drawn on the programs. Government figures show that men and women miss about the same number of days from work per year, since some years men miss a few more hours, and some years women miss a few more hours. Overall, it all comes out about the same.

Second, and very importantly, disability rates decline as wages rise. Low-income workers, regardless of sex, show a significantly higher disability rate than high-income workers. Some full-time workers earn, as we all know, two-thirds of what men workers earn in this country, on the average. It follows that women as a group are going to account for more of the short-term disability days than men do.

A similar pattern, as one would expect, is apparent for black and other minority workers as compared to white workers because they are low income workers.

The important point here is that individual income not sex is the predictor of disability rates. Women are disproportionately among the low-income workers, and it is the reason, it appears, that women have more disability than men are more heavily under disability programs.

From Justice Rehnquist's analysis in *Gilbert*, it is apparent that the disability plan is viewed in terms of its purpose—job security and protection against unexpected loss of income due to disability—men are protected against all risks of income loss due to disability, while women are not, since, if a woman's disability is in any way connected with pregnancy, she faces a period of nonprotection and income loss.

Where a man and a woman, in the same job, with the same beginning date of employment, earning the same pay, each suffers one disability of the same duration during their work life with the company, and the woman's disability is in any way connected with pregnancy, the man will receive partial income replacement under the company disability program, but the woman will not.

This bill to amend title VII by making it clear that pregnancy discrimination is within the definition of sex discrimination is the simplest and surest way to guarantee that the great mandate of title VII will be realized for working women in this country.

It makes explicit what the EEOC and every Federal court, except the Supreme Court, believed was the intent of the Congress when it passed the act in 1964, and extended it in 1972.

This bill will make pregnancy-based discriminations subject to the same scrutiny on the same terms as other acts of sex discrimination, and, of course, provide the employer with the same defense, if proven, that the act recognizes for other forms of sex discrimination.

I suppose that it is obvious, but it is perhaps worth noting that while failure to pass this bill will have tremendous consequences for working women, passage of the bill imposes no new, unfamiliar or untried legal burdens upon employers or legal principles upon the courts.

Until December 7 of last year, when the Supreme Court handed down the *Gilbert* decision, the Federal courts ably handled and resolved the pregnancy issues. This bill, when it becomes law, will simply enable the courts to continue that task according to the familiar and workable principles which they have developed over the past few years. I urge its passage.

Mr. HAWKINS. Thank you, Ms. Williams.

We will next hear from Ms. Ross.

STATEMENT OF SUSAN DELLER ROSS, AMERICAN CIVIL LIBERTIES UNION, NEW YORK CITY

Ms. ROSS. Mr. Chairman, thank you for giving me the opportunity to testify before this subcommittee. I am appearing today on behalf of the Campaign to End Discrimination Against Pregnant Workers.

The campaign is a broad-based coalition of women's rights organizations, civil rights groups, labor unions, and other public interest groups, formed just 1 week after the Supreme Court handed down its decision in *Gilbert.*

These groups were united by one concern—the realization of *Gilbert's* enormous potential for harm in eradicating the rights which women workers had fought so hard to achieve in 13 years since Congress enacted title VII of the 1964 Civil Rights Act.

The campaign supports H.R. 5055 because it will restore title VII as an effective tool in eradicating sex discrimination in employment. It will reinstate what we believe Congress always intended—that all sex discrimination be eliminated, root and branch, from the marketplace, especially including discrimination focused on that one condition which makes women different from men—their childbearing capacity.

The proposed law does this through two simple concepts.

First: It makes clear that sex discrimination necessarily includes discrimination based on pregnancy, childbirth, and related medical conditions.

Second: It defines the appropriate standard for eliminating such discrimination, by providing that pregnant workers who are able to work shall be treated the same as other able workers, and that pregnant workers who are unable to work shall be treated the same as other disabled workers.

The first concept seems self-evident. Classifications based on pregnancy and childbirth affect women and only women. Indeed, pregnancy and childbirth are the result of a physical structure and biological potential which, more than any other characteristic, define a person as a member of the female sex.

The second concept—equal treatment for those who are similar in their ability or inability to work—is necessary to end the whipsaw effect that pregnant workers are subjected to.

On the other hand, pregnant workers are told early in their pregnancy, when they are perfectly willing and able to work, that they are disabled and must stay home on long unpaid leaves of absence, sacrificing pay and career opportunities given other able workers.

On the other hand, when they are actually hospitalized or are recuperating from delivery, they are told that they are not disabled after all and are thus denied disability and medical benefits given routinely to other disabled workers.

The point here is that no conclusion about a woman's medical ability to work can be drawn from the fact of pregnancy per se. Most women are able to work through most of their pregnancies. They should be allowed to work like any other able workers.

Conversely, all pregnant women have some period of medical disability, beginning in a normal pregnancy with labor itself and continuing through the normal recuperation period of 3 to 8 weeks after childbirth. These disabled women should likewise be given the same fringe benefits all other medically disabled workers get.

In adopting the standard of equal treatment for those who are similar in their ability or inability to work, H.R. 5055 incorporates the theory of the EEOC pregnancy guidelines which the Supreme Court declined to follow.

By passing this bill, Congress would thus be affirming that the EEOC properly interpreted title VII, and that the Supreme Court erred in failing to give the guidelines their customary great deference.

The campaign believes that the EEOC exhibited both great leadership and an in-depth understanding of how best to eradicate sex discrimination from the marketplace when it enacted the pregnancy guidelines in 1972. This was demonstrated convincingly by the virtual unanimity with which the guidelines were followed.

For example, the vast majority of State human rights agencies also followed the EEOC's lead, often adopting the guidelines word-for-word as their own. The correctness of the EEOC standards is further demonstrated by the number of States which have refused to follow the Supreme Court's lead in interpreting State human rights laws which are virtually identical to title VII.

In a case raising exactly the same issue as *Gilbert*, New York State's highest court, the prestigious court of appeals, declined to follow the Supreme Court's holding, politely noting that it was instructive, but not binding, without further discussion.

Through their State human rights agencies, several other States have taken the same position, including the District of Columbia, Kansas, Michigan, New Jersey, Pennsylvania, South Dakota, and Wisconsin.

These State rulings suggest another reason for passing H.R. 5055: to provide one uniform national policy for dealing with discrimination against pregnant workers. There are now at least 14 States, including the major industrial States of California, Michigan, New Jersey, New York, Pennsylvania, and Wisconsin, which require employers to provide temporary disability payments to disabled pregnant workers which the Supreme Court rules were not required by title VII.

A uniform Federal standard requiring all employers throughout the United States to observe the higher standard is essential.

The campaign also supports the clarifying amendment to H.R. 5055, which provides, in essence, that employers may not lower benefits or compensation in order to comply with this bill.

This provision is needed because some employers have threatened to deprive everyone of disability benefits rather than provide them to disabled pregnant workers.

Obviously, the purpose of antidiscrimination law is not to lower the living standards of all workers, but rather to improve the treatment of those who have been discriminated against.

In my testimony so far, I have focused on the importance of passing H.R. 5055 in order to guarantee equal employment opportunity for women workers. But far more is at stake than the fate of women workers.

The *Gilbert* decision contained several ominous signals for all classes protected by title VII, and it is important for Congress to send a direct signal back to the Supreme Court that it will not tolerate any erosion of title VII. Quick passage of H.R. 5055 would convey that message.

I would like to outline very briefly some of the more troubling arguments in the *Gilbert* opinion. First, the Supreme Court announced that it would examine and rely upon court decisions construing the Equal Protection Clause of the Fourteenth Amendment, to determine what Congress intended in title VII's prohibition on discrimination.

This idea is patently ridiculous as to the sex discrimination provisions of title VII, for if Congres meant to incorporate equal protection doctrine into title VII in 1964, it meant to do precisely nothing.

In 1964, the Supreme Court had an unbroken record of upholding the most blatantly sex discriminatory practices under the Fourteenth Amendment, including absolute prohibitions on women working as lawyers and bartenders. But even as to minorities, reliance on current equal protection doctrine could be used to undermine title VII very seriously, by incorporating the necessity to prove intent to discriminate.

Second: The Supreme Court refused to follow the EEOC guidelines in part because they were not a contemporaneous interpretation of title VII. This idea is troubling not only because it leaves the agency no time to develop an understanding of how discrimination operates, but also because many of the EEOC guidelines have changed over time as the agency gained more in-depth understanding of the problem under consideration.

Indeed, the testing guidelines considered in *Griggs* were first issued in 1966 and then modified in 1970. Moreover, Congress itself has recognized that the process of interpretation of title VII is necessarily an evolutionary one.

Finally, the Court's interpretation of the Bennett amendment of section 703(h) of title VII was an extreme example of result-oriented analysis of statutory language. It ignored the plain meaning of the Bennett amendment, which simply incorporates equal pay exceptions into title VII.

As Senator Dirksen explained, before the passage of the amendment, to reach the result the court wanted, it relied instead on a clearly erroneous statement of Senator Humphrey who asserted after passage of the amendment that the Equal Pay Act allows employers to retire women earlier than men, a statement which is patently untrue, since the Equal Pay Act does not purport to deal with anything other than wage discrimination.

Based on Senator Humphrey's erroneous views, the Court then concluded that section 703(h) allows the pregnancy-based discrimination at issue in *Gilbert.*

The campaign believes that nothing in the explicit language or relevant legislative history of section 703(h) supports this view. Nevertheless, the Court's strained, result-oriented analysis makes necessary the proviso in H.R. 5055 that nothing in section 703(h) of this title shall be interpreted to permit sex discrimination based on pregnancy, childbirth, or related medical conditions.

In sum, then, the *Gilbert* decision presents enormous potential for undermining the effective enforcement of title VII for all protected classes—both women and minority groups.

The campaign urges quick passage of H.R. 5055, with strong supporting committee reports repudiating the result-oriented analysis of that decision and its apparent attempt to undermine title VII.

Both are needed to guarantee that title VII does not become a meaningless gesture to workers who have long been denied a fair chance to participate fully in the nation's commerce.

Mr. HAWKINS. Thank you, Ms. Ross. Ms. Sherrie O'Steen, the plaintiff in *General Electric* v. *Gilbert and IUE*, is the next witness.

STATEMENT OF SHERRIE O'STEEN, PLAINTIFF, IN GENERAL ELECTRIC v. GILVERT AND IUE

Ms. O'STEEN. My name is Sherrie O'Steen. I was employed at GE at the parts plant in Virginia. I began working at General Electric on January 1, 1971. My job was as a processor on an assembly line.

I became pregnant in 1972, and I already had a 2-year-old daughter at that time. The rules of the General Electric handbook said that in my last 6 months of pregnancy, I must quit work.

I had no money except what I had from my paycheck each week. When my pay stopped, I had no money. At that time, I had to apply for welfare. Before my first welfare check came, my electricity was cut off because I had no money to pay my bill.

I had no money to heat my home at that time either. I lived in the country, outside of Portsmouth, in an unlighted and unheated house with my 2-year-old daughtetr. I had no stove to cook on, no lights, and no refrigeration. I could not keep food that required refrigeration, and I could not cook because I had no stove to cook on.

My daughter and I ate cold sandwiches and drank water, except for twice a week when I could walk to a neighbor's house to receive a warm meal.

Before GE put me out without any pay, I could put milk in my home for my child and me, and eat three balanced meals a day.

I got worried over this condition, and I worked myself into a nervous state. I got myself in such a nervous state that I had to have medical attention. The doctor had to give me librium pills to calm me down. The doctor decided at the time that I had to have a shot at that time, and the shot was so strong that it knocked me out.

On November 21, 1972, my child was born. I did not receive my welfare check at this time, until 2 or 3 weeks after he was born.

I shall always worry about this condition of my pregnancy because it might affect my child's whole life.

I went back to work for GE in January of 1973, as soon as I had my 6-week checkup from my doctor. Men employed by GE get disability benefits for 60 percent of the regular pay when they are off from work due to a physical condition. They get paid when they are off from work due to a physical condition. They get paid when they are off work, even for a hair transplant.

I believe that I was discriminated against because of my sex when I was put off my job without any pay when I was pregnant. I hope that Congress will pass this bill so that no one will ever have to suffer as I suffered during the time of my pregnancy.

Thank you.

Mr. HAWKINS. Thank you, Mrs. O'Steen. We are very appreciative of your testimony before this committee. We understand the amount of emotional strain that it must cause you. Certainly, it is a privilege to have you as a witness before the committee.

Now, we will direct questions to the members of the panel. We hope that the members of the subcommittee will use their usual caution in order to get the other witnesses through this morning. We will try to confine ourselves to one question to each panelist, and hope that this will operate successfully.

Mr. Weiss.

Mr. WEISS. Mr. Chairman, I find the testimony very persuasive and I have no questions.

Mr. HAWKINS. Mr. Pursell.

Mr. PURSELL. No questions.

Mr. HAWKINS. I don't want to frighten the members.

Mr. LE FANTE. I have no questions, but I would like to thank the witnesses for appearing this morning.

Mr. HAWKINS. Ms. Williams, I had several questions, but you answered them in your presentation. I think that this, perhaps, illustrates how effectively the job has been done by the first panel.

We want to thank you for your presentation. At this time, you are dismissed.

The next witness is Andre Hellegers, director, Joseph and Rose Kennedy Institute for the Study of Human Reproduction and Bioethics, Georgetown University, Washington, D.C.

I understand, Doctor, that you are the only witness on this panel. We do have your prepared statement which will be entered into the record in its entirety at this point. We hope that you will proceed to summarize as you so desire.

[Statement referred to follows:]

PREPARED STATEMENT OF DR. ANDRE HELLEGERS, DIRECTOR, JOSEPH AND ROSE KENNEDY INSTITUTE, GEORGETOWN UNIVERSITY

Mr. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

For purposes of identification, I am Dr. Andre E. Hellegers, M.D., Professor of Obstetrics and Gynecology and Director of the Joseph and Rose Kennedy Institute for the Study of Human Reproduction and Bioethics at Georgetown University. I testify only on my own behalf.

I welcome the opportunity to testify on behalf of this bill for several reasons. They may be described respectively as reasons of justice, reasons of social good, and reasons of logic.

The reasons of justice go to the core of the matter of discrimination. It has been argued, in the decision of the Supreme Court, that omission of pregnancy disability benefits does not discriminate between men and women, but rather between men and nonpregnant women on the one hand, and pregnant women on the other hand. In brief, it is said the ruling does not discriminate on the basis of sex. Like Associate Justice Stevens, I would dissent from that opinion. As he so cogently states it: "It is in fact the capacity to become pregnant which primarily differentiates the female from the male." As is wellknown, surgical techniques are today available to "change men into women." One such person formerly played on the male tennis circuit and today competes on the female tennis circuit. Several such men, surgically changed to "women" are today married to men. The one thing which cannot be done is to *so* change men into "women" that they can become pregnant. Mr. Justice Stevens is right. It is precisely the capacity to become pregnant which primarily differentiates the female from the male. External appearances can be deceptive and can be surgically and medically manipulated - the essence *cannot* and the essence is the capacity to become pregnant.

My second reason for supporting this legislation is the social good. I append to this testimony a table showing the relationship between family income and the incidence of prematurity among children born in these families. The data come from a study done at the Kennedy Institute with a grant from the Office for Economic Opportunity, precisely to study the effect of absence of income on infant outcome. Even the briefest glance at the data shows the well-known fact that as income decreases, prematurity increases. I need not remind you of the well known fact that premature infants spend extra time in intensive care nurseries. In fact, for every 1% increase in prematurity, $30 million are spent annually in nursery care for the nation as a whole. That is only the cost of immediate care in hospitals. It is well known that prematurity is a major cause of learning disabilities and mental retardation, annually costing the nation millions of dollars in care and in loss of income. We do well to remember that today 40% of all pregnant women work and large numbers of them are heads of households. If it is argued that amending the law would cost too much, during pregnancy, I would simply like to stress that not to do so costs too much after pregnancy and the nation will have to foot the bill either way.

My third reason for supporting the bill is a reason of logic. I have long been an opponent of abortion on request. My reason for that stand is that I view the unborn child as a subject for our concern rather than as just another tumor. The Supreme Court, in its reasoning to permit the "liberalization" of abortion, in part alleges that we do not know when human life begins in utero and that there is no agreement on the subject. So, for purposes of abortion law, the Court is prepared to view the fetus as just a tumor which may be removed. Yet if (in pregnancy) a woman were just to have a tumor in her uterus, she would qualify for disability benefits. We therefore now face the paradox that for purposes of abortion law the fetus may be considered as a tumor, but for purposes of disability benefits the fetus may not be considred as a tumor for if it were the woman would qualify for disability benefits.

That is not the only paradox. If, by overeating, a woman gains 30 pounds and her underlying hypertension or diabetes becomes overt, she qualifies for disability benefits. If the same 30 pounds are gained by pregnancy and her underlying hypertension or diabetes becomes overt, she does not qualify for disability benefits. It is then sometimes argued that pregnancy is voluntarily entered into. I presume that, following that line of reasoning, overeating is involuntary. The paradox goes further. If a woman only believes she is pregnant, but in fact is not, and if as a result of her belief - or pseudopregnancy, as it is called - she develops disabling vomiting, she qualifies for the disability benefit. If the same disability results from a real pregnancy she does not qualify. Indeed, if, as sometimes happens, a husband develops his wife's pregnancy symptoms, and it disabled him he would qualify for the benefits but she would not.

One could continue such exercises in logic ad nauseam. Suffice it to say that for me the issue is clear. It is that, whether one comes at the question from a view of discrimination, of social good or from logic, it seems clear to me that a grave injustice has been visited on women and on their unborn children. When all is said and done, this state of affairs exists for only one reason - it is that men cannot get pregnant. If they could become so, even the Supreme Court would acknowledge, I believe, that not to give the benefit to women, but to give it to men, would be discriminatory. It is, then, man's incapacity to become pregnant - even when surgically changed into a "woman" - which is at the heart of the matter. It confirms for me again the correctness of Mr. Justice Stevens' opinion. It is indeed the capacity to become truly pregnant which differentiates women from men (even when surgically reconstructed into "women" or men with "pseudopregnancy" symptoms) and the law, as it stands, therefore, discriminates on the basis of sex in its essence, rather than its superficial appearance. It is for this reason that I believe that for both obstetrical and ethical reasons this bill should be supported.

Enclosure.

Andre E. Hellegers, M.D.

Table 8 Average birth weight and percent of births 2500 grams or less by color, family income and employment status during pregnancy: United States, 1967, 1968, and 1969 legitimate live births

Family Income and Employment Status During Pregnancy	White Mothers		Non White Mothers	
	Average Birth Weight	Percent of Births 2,500 grams or less	Average Birth Weight	Percent of Births 2
Under $3000	3270	8.2	3100	14.2
Not Employed	3260	8.8	3150	12.0
Employed	3300	7.1	3040	17.8
$3,000-$4,999	3290	7.9	3060	14.6
Not Employed	3280	7.8	3070	13.8
Employed	3300	8.0	3060	15.9
$5,000-$6,999	3320	5.5	3130	13.4
Not Employed	3320	5.5	3130	13.9
Employed	3310	5.4	3120	12.9
$7,000-$9,999	3320	6.2	3150	9.3
Not Employed	3330	5.4	3180	9.7
Employed	3300	7.2	3120	9.0
$10,000-$14,999	3330	6.4	3180	8.8
Not Employed	3380	4.6	3170	7.9
Employed	3290	8.1	3190	9.2
$15,000 and over	3310	6.2	3120	9.4
Not Employed	3310	6.1	*	[illegible]
Employed	3320	6.4	*	[illegible]
All Incomes	3310	6.5	3110	13.0
Not Employed	3320	6.1	3130	12.4
Employed	3300	7.2	3090	13.6

* Less than 10,000 births

STATEMENT OF DR. ANDRE HELLEGERS, DIRECTOR, JOSEPH AND ROSE KENNEDY INSTITUTE, GEORGETOWN UNIVERSITY

Dr. HELLEGERS. Thank you, Mr. Chairman.

In addition to being the director of the Kennedy Institute, I am a professor of obstetrics and gynecology, and was, in fact, the obstetrical witness in both the EEOC hearings and at the *Gilbert* v. *General Electric* case.

I welcome the opportunity to testify on behalf of this bill for several reasons. They may be described respectively as reasons of justice, reasons of social good, and reasons of logic.

As far as the side of justice, it is to me to be plainly obvious that to discriminate on the basis of pregnancy is, in fact, to discriminate on the basis of sex. The reason I say that is that for many years now we have had surgical techniques which made us capable of turning men into women.

In fact, we have a man tennis player who plays on the women's tennis circuit. The one fact that one can guarantee is that even though you can change the external appearances, what you cannot change is the ability to become pregnant. That is the one and only separating factor.

I want to testify also on the ground of social good, and I have appended to my testimony a table from a study that we did at the Kennedy Institute at Georgetown, specifically with a view to this case.

You will find what happens in there in terms of loss of income to infant outcome. What, in fact, happens is that it markedly increases the instance of prematurity in the offsprings of those who do not have the income.

So this bill discriminates not only against women, but it discriminates against also unborn children. It has been said, or it has been argued that amending the law would cost too much during the pregnancy. I can only add that if you do not pay for it during pregnancy, the Nation will pay for it after pregnancy in the form of prematurity and its consequences in terms of disabilities and mental retardation.

My third reason for supporting the bill is the reason of logic. I have long been an opponent of abortion on request for the simple reason that I do not regard the fetus as simply another tumor. We now run into this paradox.

If, indeed, a woman who is pregnant had not a fetus but a tumor, she would qualify for the disability benefits. But it is precisely because she does not have a tumor that she does not qualify for the disability benefits. So for the purpose of the abortion law, we consider the fetus to be a tumor, but for purposes of disability benefits, it does not consider it to be a tumor.

To carry this to an even greater lack of logic, if a woman believes that she is pregnant, but has, in fact, a false pregnancy and because of her belief she develops disabling vomiting and has to be hospitalized, because of that belief she will get the disability benefits. But if she really is pregnant she does not get the disability benefits.

To go further, if her husband believes that he is pregnant, he would get the disability benefits, but his wife would not if she really was pregnant.

Simply on the basis of logic it makes no sense.

So let me summarize very rapidly to say that we have here an issue in which Justice Stevens is correct, it is the ability to become pregnant which separates men from women. It is not external appearances. We can handle the external appearances by surgery.

Second: It is bad for the Nation, in terms of prematurity and the consequences that it causes in the children as well as the mothers.

Third: It makes no sense to consider the fetus as something which on occasion is a tumor and on occasion is not tumor.

For all of these reasons, obstetrical and ethical, I am in support of this bill.

Mr. **Hawkins**. Thank you, Dr. Hellegers. You have not only followed our admonitions with regard to brevity, but I think you have done an excellent job of thinking through the issues in a most understandable way

Mr. Le Fante.

Mr. **Le Fante**. I have no questions.

Mr. **Hawkins**. Mr. Sarasin.

Mr. **Sarasin**. Thank you, Mr. Chairman.

Dr. Hellegers, thank you for your testimony.

When we talk about this bill that is before us, what are we talking about in the way of cost?

Dr. **Hellegers**. Other witnesses will talk about that. Let me simply talk about the cost of not passing it. It is fairly well known that for each 1 percentage point of prematurity in the Nation, you will will pay $13 million in intensive care nursery costs. That is not even counting the cost for learning disabilities, the cost of mental retardation, and so forth, that follow.

If I can show you the table at the end of my testimony, you will see, if you follow the right-hand column, that for nonwhite mothers with incomes of under $3,000, the incidence of prematurity is 14.3 percent. If you come down the column, you will find that a given point, you reach prematurity rates of 9.0 and 8.0 percent, down to 7.9 percent.

So it is right there. By bringing a person through income from $3,000 to $7,000 or $8,000, in simply nursery and pediatric costs, you are saving close to $150 million right there.

So I would simply urge that as you listen to the figures of cost, quite apart from the issue of justice, you keep in mind that you pay the bill one way or the other, either during pregnancy, or after pregnancy.

This is one of the reasons why most of the Western World, outside of the United States, has comprehensive materity programs to prevent this kind of thing from happening. I, as a Dutch citizen, am amazed that the United States should be the only country that does not have it, because we have long recognized this need in Western Europe.

Mr. **Sarasin**. Those costs will be to society rather than an individual entity that may be employing that person.

Dr. **Hellegers**. It would come out of taxes for the homes for the mentally retarded.

Mr. **Sarasin**. It is a cost to society and not the individual entity who might be employing that person.

Dr. Hellegers. I suppose that that individual employer will be paying his taxes.

Mr. Sarasin. Along with a lot of others.

Mr. Hawkins. Mr. Pursell.

Mr. Pursell. I was wondering. In your experience, the average time lost in pregnancy, is that basically the same national average?

Dr. Hellegers. It varies considerably. I would say that this is something that a doctor can determine by the same kind of examination as you examine other people in terms of availability for work.

Mr. Pursell. There is no an average in your experience?

Dr. Hellegers. Let me put it this way. In the obstetrical services, nurses that are pregnant work to the day of labor. So do women obstetricians, and so do women pediatricians, so do experts keep working right through to labor, unless they are disabled, of course.

Then, after pregnancy, I would think that it is a matter of 3 weeks. As I have said, and frequently I have reason to advise that if a woman, for example, were a lawyer and had to be in a case in court, I would ask her to go to 3 or 4 days further.

Mr. Pursell. It seems to me that in the military there is a philosophy that they should go back to work quickly. You don't really have a figure?

Dr. Hellegers. No; and let me tell you why not. The classical obstetrical advice has been to say to the woman who is discharged from the hospital after the delivery, "Come to see me in 6 weeks."

Now, why is that advice given? That advice is given because if by 6 weeks things have not gone back to normal, your are then dealing with something highly abnormal. So that is kind of a general, statistical policy that is followed, which does not mean that some people are not back at work much earlier.

I can give you a very simple example. I have four children. We had those four children planned in 5 years. But by the time my wife had the fourth, there were three at home. I suggest that we start thinking about how women who return home after childbirth actually do a phenomenal amount of work around the home with their children. They would be much better off being secretaries in an office.

Mr. Pursell. I agree. Thank you very much, Doctor.

Mr. Hawkins. Doctor, in the *Gilbert* case, as I recall, your testimony was that the time loss as a result of pregnancy or childbirth in 90–95 percent of the cases was 6 weeks or less. You have indicated a time even less than that. Do you agree that it is in this neighborhood.

Dr. Hellegers. I would say that 95 percent lose less than 6 weeks. I would agree with that statement, but the question is, how much less? That would depend on the individual.

Mr. Hawkins. Do you believe that the court decision in *Gilbert* actually encourages termination of pregnancies?

Dr. Hellegers. That would be one possibility. There were interviews in newspapers in which one lawyer did, in fact, say: "Women can always get abortions." That, incidentally, to me, makes this bill also an alternative to the abortion bills.

That is why I would say that the people who are interested in decreasing abortions, as I certainly am, should be strongly in favor of this bill.

Mr. HAWKINS. Thank you very much, Doctor. You have been very helpful to the committee.

Our next witness is Mr. Kenneth Young, assistant director of department of legislation, AFL–CIO, Washington, D.C., accompanied by Laurence Gold, special counsel to the AFL–CIO.

Mr. Young and Mr. Gold, I welcome you as witnesses this morning. We know of your tremendous interest in this legislation, and we look forward to hearing your views.

Mr. Young, you need no introduction to the subcommittee.

STATEMENT OF KENNETH YOUNG, DIRECTOR, DEPARTMENT OF LEGISLATION, AFL–CIO, ACCOMPANIED BY LAURENCE GOLD, SPECIAL COUNSEL, AFL–CIO

Mr. YOUNG. Mr. Chairman, before begin, in an effort to comply with the 24-hour rule, we sort of rushed through the testimony. If we could, we would like to send a corrected copy of the statement up here. A number of typographical errors appear in the statement, and a number of footnotes were left out. We will get the corrected statement to the subcommittee later.

Mr. HAWKINS. Without objection, the statement which is to be submitted to the committee, will be entered in the record in its entirety. We hope that you and Mr. Gold will accommodate us by summarizing this morning, so that we can listen not only to you, but to a number of other witnesses.

[Statement referred to follows:]

TESTIMONY OF LAURENCE GOLD, SPECIAL COUNSEL, AFL-CIO, BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES OF THE HOUSE EDUCATION AND LABOR COMMITTEE ON LEGISLATION TO AMEND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 TO PROHIBIT SEX DISCRIMINATION ON THE BASIS OF PREGNANCY

April 5, 1977

My name is Laurence Gold, Special Counsel, AFL-CIO. With me is Kenneth Young, Assistant Director of Legislation, AFL-CIO. We are here to record the Federation's strong support for H.R. 5055, the bill to help end discrimination against pregnant workers.

I plan to discuss the AFL-CIO's interest in this proposal, why the Federation thinks the legislation is essential to help secure equal quality for women in the workplace, and to state our basis for discounting one of the major "objections" to the bill - that it will substantially increase disability plan costs.

I. AFL-CIO's Interest

The AFL-CIO supports the principle of equality of opportunity in the workplace, and has worked hard to assure that employers eliminate practices which discriminate against minorities and women. To further that goal, the AFL-CIO devoted its efforts to passage of Title VII of the Civil Rights Act of 1964.

To compliment our legislative program the AFL-CIO and its affiliates have sought to further the important goal of employment equality for women through collective bargaining agreements that contain the best possible benefits - including income support coverage - for all workers, including pregnant workers. In those negotiations, we have found that some employers would extend coverage to pregnancy-related disabilities, but that others would do no more in this area than was required by law. Accordingly, such unions as the International Union of Electrical, Radio and Machine Workers, AFL-CIO and the Communications Workers of America

AFL-CIO determined to work through the courts to make clear to employers that Title VII did impose a legal requirement to treat pregnant women fairly. Those unions were in the forefront of the litigation to help secure better benefits for women, and in particular for pregnant women. The AFL-CIO too joined in that litigation by filing briefs amicus curiae in the Supreme Court in support of the position of its affiliates.

After the decision in Gilbert v. General Electric, it became clear to the AFL-CIO that legislation was needed, and needed promptly, if the goal of fair treatment for pregnant workers was to be realized. Therefore, the Federation joined with a broad-based coalition of organizations and individuals to help secure legislation clarifying that Title VII was in fact always intended to provide the protection to pregnant women for which AFL-CIO and many others had been working.

II. Why the Legislation is Important.

Ultimate equality for working women entails far more than simply eliminating "women's jobs" and "men's jobs." It means assuring that women are treated as having the same long-term interest in staying on the job as men, and in assuring that they have the same opportunity as men to keep a job. Much of the disparate treatment of women in employment has come from unfounded assumptions about their lack of interest in continuing careers because at some time they are likely to become pregnant and to have children. In fact, discrimination against women in employment revolves in large part around the pregnancy question. Failing to pass legislation to overrule the Supreme Court's decision in Gilbert v. General Electric will permit such discrimination to continue.

A. Practices Regarding Pregnancy Which Have Adversely Affected Women Workers.

Employers in the United States have in some instances sought to exclude women generally from employment on the ground that women may become pregnant, and that the pregnancy could make continuance on the job difficult. See, e.g. Cheatwood v. South Central Bell Telephone Co., 303 F. Supp. 754 (M.D. Ala. 1969). Women applying for jobs have customarily been, and still are, questioned about their marital status, and their intentions in regard to childbearing and use of birth control. Still other employers have in effect fired women at some specified stage in a pregnancy, permitting them to reapply for jobs later as new employees with attendant loss of seniority privileges and pension rights.

Of course, mandatory separation where loss of seniority is involved has ramifications beyond a temporary loss of pay. Women dependent upon their income but intending to have children may be constrained to accept less desirable jobs which do not provide for mandatory pregnancy leave. Further, if seniority is lost, a woman's entire career could be affected: there may be no job to return to when she has recovered or, if she does return to her old position, she will have a slower advancement to higher positions, because other employees hired later will have priority.

Another discriminatory employer practice affecting pregnant women is the exclusion from the provision for a certain number of absences with pay for days lost due to sickness, prohibiting use of accumulated sick leave for absences due to pregnancy, childbirth, or recovery therefrom. The obvious result of such a policy, is to cause the women affected to lose payment of wages or a portion thereof even though they return to work promptly upon recovery, and even though the effect of permitting use of accumulated sick leave on the employer is precisely what it would have been if any other disability had occurred.

The overall affect of the special disadvantages imposed on pregnant women, and women workers because they might become pregnant, is to relegate women in general, and pregnant women particularly, to a second-class status with regard to career advancement and continuity of employment and wages.

These disadvantages are particularly serious because 70% of the 35 million women who work do so out of economic necessity--they are divorced, widowed, single, or married to men who earn less than $7,000 per year and who therefore must depend on two salaries to make ends meet. Many of these women are likely to be working when they are pregnant. We know that because the number of women with preschool children who are in the workforce has steadily risen, until currently almost 40% of mothers with children under 6 work. So for financial or other reasons, women are not as much regarding child-bearing and child-rearing as cause for substantial breaks in their career, and are more than ever likely to need adequate income protection for the short time during which they are medically disabled from working.

B. Disability Benefits as an Example of Disadvantageous Treatment of Pregnant Workers.

The refusal of employers to cover pregnancy-related disabilities the same as other medical disabilities was the problem that precipitated the Gilbert case. That refusal of equal treatment is an excellent example of the irrationality of discrimination against pregnant workers, and the crippling effect of such discrimination on women workers. Employers state that both sick leave and disability insurance have certain business purposes. General Electric noted in its 1957 Annual Report that the overall purpose of benefit plans is "to attract top-quality people at all levels and encourage them to make their careers with the company".

Disability insurance is intended a) to remove the fear of loss of income when it is most needed; b) to encourage employees to receive medical attention as soon as possible, thus minimizing the severity of disabilities and assuring maximum productivity; c) to foster morale and loyalty to the company d) to provide for maximum use by supervisors of trained employees by creating a disincentive to forcing an employee able to work to stay home. (See generally D. Allen, Fringe Benefits: Wages or Social Obligations, pp. 23, 31, 33-36 (rev. ed. 1969).)

Clearly, all of these purposes apply with full force to women who are medically unable to work because of pregnancy. First, the need for assured income is if anything greater during childbirth related disabilities than during other periods an employee cannot work for physical reasons. The possibility of lost time due to physical disability is not a vague fear but certainty during the period immediately before labor begins. And, the need for assured income during the period immediately following childbirth is heightened by the need to support the new infant, and by the added cost of child-care when the woman does return to work. To assure herself of needed income, a woman intending to bear children could well choose an otherwise undesirable job providing income maintenance during pregnancy-related disabilities over a position affording better career prospects.

Second, a woman who is not covered by a disability program for the period of childbirth and recovery therefrom is likely to return to work before she is fully able to assume her former responsibilities. As a result, her performance may be impaired, with a loss of productivity which could hamper her future advancement.

Third, the exclusion of pregnancy-related disabilities is certain to make an affected woman, and indeed all women with plans to bear children, feel that they are less-valued employees, and that the employer has little regard for their careers. As a result, the desire for advancement may be impaired, and the link to the company as a long-term employer lessened. The argument that the fact that many women who take pregnancy leave without pay fail to return to work justifies disparate treatment of pregnancy-related disabilities (see, e.g., Brief Amicus Curiae of American Life Insurance Association and Health Insurance Association of America on Behalf of Petitioner filed in the Gilbert case, at 30-31) is entirely circular. If an employer excludes such women from a program designed to promote employees' loyalty to the company, it is little wonder that they do not display that loyalty.

Finally, when the company has no responsibility for sustaining the income of a woman disabled by physiological aspects of childbirth, supervisors are encouraged to insist that she stay home, rather than accommodating the job to her condition. For example, an employer faced with the prospect of paying prolonged disability benefits to a man whose heart condition makes his stressful job impossible for him would, rationally, attempt to find a less-stressful but nonetheless productive job he can perform. If it has no such liability with regard to pregnancy-related disabilities, then in those situations in which pregnancy or complications thereof render the woman unable to perform her original job at peek efficiency, the impetus will be to put her on leave rather than retain her in another capacity. Indeed, an employer who does not provide income maintenance for pregnancy-related disabilities would be much more likely to mandate arbitrary pregnancy separation policies, since such policies would then be cost-free to the employer.

Passage of H.R. 5055 is vitally important to end practices which seriously and adversely affect pregnant women workers just described, and to reverse the Supreme Court's ruling about pregnancy-related disability benefits in the Gilbert case.

C. Why the Cost Argument Against H.R. 5055 is Unsound

The argument most often raised by employers against prohibiting pregnancy-related discrimination is that the cost of equal treatment is too high. To answer that argument, at this point we wish to focus on the costs of providing the same income maintenance coverage for pregnancy-related disabilities as is provided for all other disabilities. First, we will examine the high figures that have been suggested to show why they are just plain unrealistic, and then we will try, on the basis of the best data available to us, to estimate what the actual additional cost of coverage would be if this legislation passes.

I. The Unrealistic Estimates

A very high cost estimate for H.R. 5055 has been floated around in an effort to kill the bill. It is G.E.'s estimate, introduced at the trial in the *Gilbert* case, of the cost for providing all U.S. employees covered for short term disability with maternity coverage on the same basis as coverage for any other disability. G.E. as the defendant in that case suggested that the increase in total benefits per year over those now provided would be $1.6 billion. To reach that figure, G.E. calculates the cost of providing pregnancy-related disability coverage to women workers with pregnancy-related disabilities, then deducts the cost "benefits currently provided" for pregnancy related disabilities.

Although G.E.'s approach is right, the figures it uses are based on several greatly misleading assumptions. First, G.E. calculates that it would cost about $1.845 billion to provide complete coverage for pregnancy-related disabilities for an average coverage of 30 weeks. However, uncontroverted testimony in the *Gilbert* case showed that more than 90% of women would be disabled an average of only 6 weeks. So the G.E. figures on cost throughout the United States have to be divided by 5. (Also, some plans exclude payments for the first 8 days of disability. In such cases, women would only get *paid* for 5 weeks..) Even if *no* other adjustments were made in the G.E. statistics, taking one-fifth of the 30 weeks cost and deducting the current costs figure puts H.R. 5055's cost at $145 million. This is a far cry from G.E.'s $1.6 billion claim.

Second, G.E. in arriving at its claim deducts $225 million for benefits now provided. But fourteen justidictions (13 states and the District of Columbia), which accounted for almost 40% of the births in the United States in 1975, now require employers to provide some kind of disability-benefits coverage for pregnancy under their own state laws. And, not all employers in those jurisdictions were, at the time G.E. made its estimate, providing such coverage. Therefore, the cost of the coverage which must be provided independent of any change in Title VII, whether or not it is being provided at this very minute, must be substantially increased. When the costs effect of these state laws is taken into account, the cost of H.R. 5055 is further reduced.

Finally, the G.E. cost figures do not in any way take into account the extent to which eliminating pregnancy discrimination saves the employer money--by encouraging good, experienced workers to stay on the job, thereby increasing productivity and reducing costs of retraining, and reducing the likelihood that workers will use unemployment compensation. Nor does it take into account the saving to other citizens, because such benefits reduce the likelihood that workers with pregnancy-related disabilities will need to resort to unemployment compensation or welfare benefits.

Each of the miscalculations made by G.E. provides a guide for looking at the other inflated cost figures for H.R. 5055 stated by those opposed to H.R. 5055. If correct assumptions or facts about the basic factors -- the duration of benefits, the amount to be paid, the number of employees already covered or lawfully required to be covered by such plans -- are not used, the resulting gross "cost" figures will not be accurate.

The recurrence of industry over-estimates on cost of providing pregnancy-related disabilities coverage is apparent from statistics provided by the Society of Actuaries. Their tables show that for plans for the years 1972 through 1974, (the most recent for which figures are available), the amounts actually paid by companies of less than 1,000 employees were from 38% to 40% of the amounts that the actuaries estimated would be paid. (See Society of Actuaries Transactions, "Group Indemnity Insurance," (1976), at 244.) The wrong estimates were attributed to declining birthrates (id., at 241); those same declining birthrates will continue to affect the cost of providing disability benefits for pregnancy-related disabilities. These figures provide some guidance to what credence should be given to some of the high cost figures used as scare-tactics by employers and insurance companies.

2. What are the Actual Costs

Getting a handle on the actual increase in costs to employers of amending Title VII by H.R. 5055 is slightly more difficult.

First, let's look at the estimates of increased cost per employee of extended coverage other than industry figures presently available. One study which has been done shows that costs annual of covering pregnancy-related disabilities under disability benefits plans may average $15 per employee using April, 1974, data. Another shows that on the basis of 1971-72 data, expense would total about $20 per employee. Still another study shows that if costs are related to female employees only; the "unit cost" (cost per employee) would be about $41 using 1971-72 data. Finally, yet another study shows that annual costs would average approximately $40 to $50 per female employee for a paid leave of 14-16 weeks. As we have pointed out, that is about twice the average leave present experience indicates would be compensable. (See generally Kistler and McDonough, "Paid Maternity Leave -- Benefits May Justify the Cost," Labor Law Journal (December, 1975), 782, 784-5, and facts and studies cited.) Therefore, the cost per employee of the coverage which would be required is not great at all, and when compared to the cost to the employer of turnover, and the great hardship and inequity to women by not providing it, it seems even smaller.

Another way to look at the cost data is to ascertain how much passage of H.R. 5055 would increase overall hourly wage costs. Those figures show that the increase would be miniscule between $.004 and $.01 to the hourly rate of employees in an affected company, or an increase to the wage bill of between 1/10 and 2/10 of one percent. (Carol Greenwald, "Maternity Leave Policy," New England Economic Review (January/February, 1973), 13,17.)

A final method of approach is to calculate the cost impact of H.R. 5055 on disability plans from the best available data and on the basis of the most reasonable assumptions suggested by that data. We have made that calculation and the method we used is set out in the margin. The cost figure we arrive at is about $1.50 per American worker or roughly $130 million in total cost. And this cost estimate does not take into account even the most obvious monetary benefits to the employer -- reduction in turnover, and reduction in tax-supported unemployment compensation and welfare costs. Certainly, the critical public goal of equal treatment for women, and the elimination of the loss of talent caused by discrimination, is worth far more than these relatively small amounts.

In 1975, 1,918,214 babies were born outside the fourteen jurisdictions which already require pregnancy-related disability coverage (discussed above). We can assume that about 40% of those are born to women working during pregnancy. (See U.S. Dept. of Health, Education, and Welfare, National Center for Health Statistics Report, Series 23, No. 7, Sept. 1968, p. 16.) (That assumption in turn rests on the reasonable premise that a disproportionate number of those pregnant workers don't work in the 14 jurisdictions already requiring coverage.) Thus, in 1975 there were approximately 767,285 women potentially to be covered by pregnancy-related disability benefits plans (assuming one baby per mother). Of this number we can assume that approximately 63%, or 460,371, work for employers having some form of income maintenance during temporary disabilities. (Health Insurance Institute, Source Book of Health Insurance 1972-1973, p. 25) (Again, we are assuming that there is not a disproportion of women covered by such plans in the 14 already-covered jurisdictions). Of those, approximately 40% would have maternity coverage for an average maximum of six weeks. (See Society of Actuaries Transactions, 1975 Reports (1976), pp. 241, 243-250.) That leaves 276,273 women giving birth in 1975 who worked for employers having disability plans which did not cover pregnancy. Assuming the average short term disability benefit for women in 1975 was about $78 per week, providing disability benefits for pregnancy-related disabilities for the full average period of six weeks would cost American industry roughly $130 million in increased costs.

In conclusion we wish to address one additional point. We have been advised that a bill has been drafted which incorporates the language of H.R. 5055 and adds a further provision which states that employers who are now discriminating in regard to pregnancy-related disabilities will not be able, if this bill is enacted, to decrease, or cause to be decreased, the benefits or compensation provided to their employees generally in order to come into compliance.

I wish to take this occasion to state the AFL-CIO's support for such a perfecting amendment. The principle embodied in the amendment is incorporated in the Equal Pay Act and is the one the courts have generally followed in Title VII cases. It is evident that legislation designed to correct discrimination cannot achieve its objective if an employer who has been discriminating responds by decreasing benefits or compensation. The proper rule is that such an employer must correct his wrong and put all his employees in an equal position by raising the discriminatees to the position of his other employees. While the amendment simply states existing law explicitly, in light of the statements of some of those opposed to H.R. 5055 that the result of the bill will be to lower the benefits and compensation of workers not presently being discriminated against, we beleive it is sound to spell out the intent of the legislation.

Thank you.

Mr. YOUNG. We have one further request, Mr. Chairman. If we could, we would like to submit, for the record, a copy of the statement adopted by the AFL-CIO's executive council on February 25.

Mr. HAWKINS. Without objection, the statement will be entered in the record.

[Statement to be furnished follows:]

Statement by the AFL-CIO Executive Council

on

Pregnancy Benefits

February 25, 1977
Bal Harbour, Fla.

The Supreme Court recently held that Title VII of the 1964 Civil Rights Act, which outlaws discrimination in employment based on sex, does not necessarily prohibit discrimination against pregnant women.

The Court may have ignored it, but the facts of life are that discrimination against pregnant people is discrimination against women alone.

Employment policies regarding pregnancy explain why women workers in general remain concentrated in lower paying, less desirable jobs. Pregnant women have been refused responsible jobs, fired, forced to take unpaid leave regardless of ability to work, and refused the right to use accumulated sick leave or vacation leave for pregnancy-related absences. In the Supreme Court case, women were denied disability benefits available to all other temporarily disabled employees.

The AFL-CIO regards the prohibition of pregnancy-related discrimination as essential to the ultimate equality of women in the workplace. Because of the Supreme Court decision, federal legislation is necessary to make sure that women affected by pregnancy are treated equally with other employees. They should be allowed to work as long as they and their doctors believe they are able to do so. When they are unable to work, they should be granted all benefits and privileges given other workers not physically able to work.

Adoption of such legislation may increase the cost of certain fringe benefit programs. Proper provision for adjusting to these increased costs must be given to labor-management negotiators.

We call upon the Congress to enact, and the President to sign, legislation prohibiting discrimination based on pregnancy and related conditions as soon as possible.

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Mr. **Young.** With that, Mr. Chairman, we would like to ask Mr. Gold, the AFL-CIO counsel, to present the testimony.

Mr. **Hawkins.** Mr. Gold, you may proceed.

Mr. **Gold.** Thank you, Mr. Chairman.

I also wish to note that we are accompanied by Marsha Berzon of the law firm of Wahl and Meyer, which is counsel to the AFL-CIO, and which is also working on this matter.

We are here in support of the bill to reverse the *Gilbert* decision, and to amend the law regarding discrimination based on pregnancy and related conditions. It is descrimination based on sex which is banned by title VII.

In light of the heavy schedule you have today, and in light of what we also believe to be the clarity of the matter, we simply would like to make four points orally, and leave the full development of the matter to our statement.

First, it appears to us to be commonsense that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women. A law like title VII, forbidding discrimination based on sex, therefore, clearly forbids discrimination based on pregnancy. That should have been obvious to the Supreme Court, and we should not have to be here. But, unfortunately, it was not, and we hope that Congress will make it so plain for the Court that we will not have to return to this subject again.

H.R. 5055 seems to us to be well adapted to its end. It is designed to make it clear that whatever may be true under other laws, this Congress does regard discrimination based on pregnancy as discrimination based on sex. In particular, employers and unions, since we have always taken the position that unions should be covered by title VII and others, must treat pregnant women as they treat other employees, similar in their ability or inability to work.

We believe that this legislation is important from our practical experience representing male and female workers, because much of the historic discrimination against women is based on the fact that it is they who become pregnant, and bear children. Employer's have, over the years, refused to hire women for certain jobs because of the possibility of a break in service connected with pregnancy, concerning child bearing capacity, and those answers are taken into account in job placement.

Employers have terminated women, when women become pregnant, and have made them become new employees at the end of their pregnancy. Most particularly, in connection with this matter as illustrated by the *Gilbert* case, some employers through bargaining, or through their own unilateral policies, will cover pregnancy disabilities through income maintenance plans, and others, historically, have not.

Women when they are most in need of the assurances of such plans and stability that such plans are intended to bring, are deprived of this most valuable benefit.

These are precisely the problems that title VII was supposed to alleviate and which we believe would alleviate under this measure.

I have not heard any argument whatsoever on the merits of H.R. 5055 which argues against the rule written into that bill. The only argument that we are aware of, which was made by the opponents is that correcting discrimination against pregnant women is too costly.

During the *Gilbert* litigation, General Electric, as the defendant in that case, came up with some cost estimates which we regard as absolutely unsound. At that point, it was to advance their position in the litigation, and it is being used to advance the position of those who do not want to see the bill become law.

I would simply like at this point to note three plain errors in the figures that General Electric has compiled, and we discuss at some length in our written presentation.

First: The estimate is based on the assumption that the disability benefits would be payable for each pregnancy for 30 weeks. The previous witness, who is an expert in the field, has advised the subcommittee that in 95 percent of the cases the proper figure would be in the area of 6 weeks, and that is without any other adjustments.

You have to divide the cost of General Electric by a factor of five. In addition, we would note that there are 14 States,, which through State law, prohibit discrimination against pregnant workers. Perhaps 40 percent of the births occur in those States. That figure has been changing and General Electric's figures, compiled in 1973, do not take account of the present state of the legal requirements which affect the cost estimates of H.R. 5055.

I think that when you take those two factors into account, it is plain that the cost that this bill would properly impose on American industry comes out to something like $1 50 per employee. Those costs, it seems to us, are far less than the cost of the provision of the Equal Pay Act, which moves to the same objective, and are costs which are properly imposed by law in this society.

I should note that in determining cost there is the other side of the coin. The purpose of an income disability porgram is to promote stability of employment, of well trained, productive employees. There is much that employers will gain from H.R. 5055 as well as the apparent losses that they are so concerned about, to bring them in line with the long-term benefits.

Given time, and given the other witnesses whom we know will address a variety of other issues, we would simply end at this point, unless the subcommittee has some questions, which we will certainly endeavor to answer to the best of our ability.

Mr. HAWKINS. Thank you, Mr. Gold.

Mr. Le Fante, do you have any questions?

Mr. LE FANTE. Would you please address yourself to the last part of your prepared statement?

Mr. GOLD. Yes; we have been advised that there is under consideration an added section to this proposed legislation which is parallel to the provision of the Equal Pay Act, which I mentioned, which assures that the bill does not result in equalization down, but rather would eliminate discrimination by assuring that the benefits presently available to the individuals who are not being discriminated against, are maintained. That the discrimination is cured by bringing the discriminities up to that level.

That type of maintenance of effort provision is, it seems to us, inherent in both title VII, as it is explicit in the Equal Pay Act. We believe that such a provision would be most sound. We certainly hope that the subcomittee will look upon it with favor.

Mr. Le Fante. I have just been informed that an amended version was put in yesterday on that very same subject.

Another question, Mr. Gold. When you talk about the actual costs breaking down to $1.50 per employee, is that an annual cost of $1.50?

Mr. Gold. Yes.

Mr. Le Fante. Thank you.

Mr. Hawkins. Mr. Sarasin.

Mr. Sarasin. Thank you, Mr. Chairman.

Mr. Young and Mr. Gold, thank you very much for appearing before us this morning.

With regard to section II of the bill, the portion that has been added which you address yourselves to, do you find any constitutional problems with that?

Mr. Gold. I cannot imagine a constitutional problem any more than anyone has to this point suggested that there is a constitutional problem with the provision of the Equal Pay Act, which treats the matter in the same way.

Mr. Sarasin. What you are saying in section II, if I understand it, is that if you have a plan you must keep it regardless of your financial circumstances. Whatever the situation is, you cannot reduce that plan, or abolish it. Yet there is no law that says that you must provide health and fringe benefits for your employees.

Mr. Gold. What the amendment says, and what the Equal Pay Act says is that you cannot adjust, under a collectively bargained situation, by depriving some people of benefits, saying that that is necessary to make up for the commensurate costs.

Obviously, when the collective bargaining opens, the entire matter can be renegotiated.

If the employer had, prior to the Equal Pay Act, been paying male employees $3.00 and the female employees, $2.50, he has to bring them all up to $3.00, but it does not mean that they are at $3.00 frozen in forever. This would apply the same in this thing.

Mr. Sarasin. We are not talking about wages. We are not talking about the concept of the Equal Pay Act. We are talking about some benefit that some employers provide and others do not, or something that would be qualified as a fringe benefit.

It is a situation that is collectively bargained for in most instances. We are saying that the Federal government says:

> You shall provide it. If, for whatever reason, you cannot increase your payment to the system, you cannot reduce it. You cannot opt out of it. It is something that you must provide for your employees, if you have it now.

We did not say: "You must provide a pension." We said: "If you have it, you must meet certain minimum standards." We did not say: "You cannot get out of it, if you cannot afford it." This is what section II says.

Mr. Gold. It says, as I indicated, it does not seem to us to be any different from precisely the same provision in the Equal Pay Act. If an employer had a disparate wage structure, he may say that he should not be required to pay those women $3.00 an hour, even though he has historically paid the men who are doing the same work in the same establishment $3.00 an hour.

Mr. Sarasin. You are talking about equal pay for equal work.

Mr. Gold. These are equal benefits for equal work. The employer is not giving these as a gift.

Mr. Sarasin. Not quite. He is not providing fringe benefits for men, and it is not equal in that situation. It is very difficult to argue what has to be, literally, a motherhood issue. I have never seen one that is better qualified as a motherhood issue than this one. But I am very much concerned that we are mandating something on the employers in this country that they did not bargain for.

It is, in a real sense, unconstitutional. I don't know how in the world you can pass the constitutional test of interfering with their contractual right with their employees, and avoid the problem of bargaining collectively which you have in every situation.

I am very much bothered by the legislation. I am bothered by its ultimate results. I am very much troubled about what is happening.

Mr. Gold. Let me make one point in response. If an employer does not have a disability plan, there is nothing in this legislation which requires him to have the disability plan. But if he has an unlawful disability plan, he has to cure the unlawfulness by bringing everybody up to coverage.

If he had a plan which applied only to his white workers, and he was sued under title VII, the decisions make it plain that the relief would not be that at that point he would have the option of scrapping the entire plan, or including his black employees under the plan, so long as the term of the plan would be. He would have to include the black employees.

At that point, whenever the contract terminated, the matter would be open for whatever nondiscriminatory decision would be made, either unilaterally, if there was no collective agreement, or through collective bargaining.

Mr. Sarasin. Are you saying that you read section II to allow an employer to terminate a health plan rather than provide the benefits that are mandated under this bill?

Mr. Gold. When it has run its term. Whenever the plan expires.

Mr. Sarasin. I don't read it that way. I read it to say that it is a violation by failing to contribute adequately directly, or by failing to contribute adequately to the benefit fund or insurance plan. You cannot reduce the benefits. I don't know how you can tell that to an employer.

Mr. Gold. In order to comply.

Mr. Sarasin. I understand what you are saying, but I am not sure that we are talking about the same thing here. It seems to me that you are saying to the employer:

> You have a plan. You upgrade it to cover the maternity benefits, and you are forever locked in to a plan. You can improve it, but you can never withdraw from it, no matter what your financial problem is in your industry, or whatever.

Mr. Gold. First of all, putting aside our disagreement on what quality means, it has never been suggested to my knowledge under either title VII or the Equal Pay Act that once the adjustment is made, and the plan or the payment wage scale is in equilibrium, that forever the employees are guaranteed that wage, or they are guaranteed a continuing job.

The point is that when there has been a wrong, there has to be some sort of order to correct the wrong. There are at least two theoretical possibilities. One is to correct it by permitting the wrongdoer to move down, and the other is that he has to correct it by moving up.

What the law in this area has been, and we think that it is the only proper approach, is that he has to move up. Once that is done, then the matter takes its course. Obviously, in a situation where the benefit program excluded pregnancy, and there are some added costs, once it has run its term, the employer can come to the union and say, "we want one extra day of waiting period to make up for those costs, which would apply across the board, and that would be entirely proper and lawful, unless there was some bad motive.

Mr. SARASIN. If you did that, under the wording of section II, you would be violating section II. The waiting of one additional work day would be in violation of section II.

Mr. GOLD. I just think that in saying that you are overlooking the history of the interpretation of the parallel provision to this, and the words: "In order to comply."

Mr. SARASIN. We obviously disagree about that.

If the period for disability is in 90 percent of the cases 6 weeks, why wouldn't a provision that said: "Such payments shall be provided for not more than 6 weeks," solve the problem?

Mr. GOLD. First of all, the bill, and what I think a sound approach, does not get at the symptom which is disability plans, but gets at the underlying problem which is that the courts have failed to recognize to this point.

The Supreme Court alone has failed to grasp the point that discrimination against pregnant people is discrimination on the basis of sex, and that is a definitional problem, and that is treated as a definitional matter, and the law is supposed to go forward and develop according to the basic rules which I have already developed, just like the courts, up to this point, have understood that if there is discrimination on the basis of sex, certain circumstances follow, and would in the future treat cases where there is discrimination against pregnant people, pregnant women in the same way.

In that way, you don't upset the whole evolving body of the law. You simply amend the basic definition, and then leave it to the courts to go forward as they have gone forward where they have recognized that there is discrimination on the basis of sex or race.

Mr. SARASIN. Why is it wrong for the courts to say, and I am not sure that this is the rationale behind the courts' decision, but why is it wrong for the courts to say:

> OK, Mrs. Employee, and Mr. Employer, this is what you bargained for by way of fringe benefits, and we will recognize that. Pregnancy was not one of the things bargained for.

By the same token, the employer in his insurance did not bargain for pregnancy, they bargained for coverage for other disabilities. Why is it wrong to say that you are not going to say that something was covered, when no one had put that in the bargaining contract to begin with?

Mr. GOLD. The collective agreement has to conform not only to the relative power of the parties, but also to public law. Again, perhaps because we are more sensitive to the issue, I don't think that any one would quarrel with the point that if an employer said, we are going to have a disability plan, but you will have to be a white male to be covered, there is no doubt that that, no matter how that was bargained out, would be a violation of title VII by the employer.

Mr. SARASIN. There is no question about that in that example.

Mr. GOLD. The point of this bill, and the point of the litigation which we sought was soundly based, was that there is no difference. There are some things that you cannot do in concluding a bargain. One of them is to practice discrimination.

Now, this does not say that taking into account your obligation not to discriminate, that you would wish to reach a certain type of bargain.

Mr. SARASIN. There is discrimination when one employer provides insurance for psychiatric care for X number of weeks, and another employer does not cover it, or another employer will only cover it for half that period of time. Is that discrimination?

Mr. GOLD. Not under any of the provisions of title VII.

Mr. SARASIN. We do say that if you have a health plan, you cover all possible health contingencies, and there is no Federal law that mandates that.

Mr. GOLD. No. It is plain that under the theory propounded in this litigation under the theory of this bill, an employer who does not wish to cover disabilities through an income maintenance plan is perfectly free to bargain for an agreement which does not provide income maintenance for disabilities.

Mr. SARASIN. Isn't that the present situation where you do not cover psychiatric care. Why don't you say, "we are not going to cover pregnancy for men or for women, which obviously is what has happened.

That is what is happening right now. Neither party is entitled to it.

Mr. GOLD. That is like saying, we will not cover prostate operations for men and women.

Mr. YOUNG. I think that what we are basically trying to say, Congressman Sarasin, is, if there is a disability plan, that plan should be nondiscriminatory. If there is a psychiatric plan, that plan must be nondiscriminatory.

If you don't have a plan at all, then you are not faced with the discrimination problem. That is really what it amounts to.

Mr. SARASIN. What you are saying in this instance, this is the one thing that must be covered by Federal law, you could exclude anything else and you would not violate the law.

Mr. YOUNG. Only if you only exclude amputations for females, you would violate the law.

Mr. SARASIN. Yet, it is perfectly proper to exclude psychiatric care, or to exclude coverage over and above a certain number of dollars, to limit the number of weeks you can have covered, in other words the plan is tailored to the ability to pay and the particular need.

Mr. YOUNG. We are not saying that you must have a disability plan.

Mr. **Sarasin**. But you are saying, if you have one, then you must cover a pregnancy as a disability, and you can never change, and you can never get out of it.

Mr. **Young**. We are not saying the latter. We are saying, if you have a disability plan, you may not discriminate under that plan.

I think, as Mr. Gold has pointed out, you can negotiate at the next round of negotiations, if there is a question, the disability plan out altogether, and he is within the law on that.

Mr. **Sarasin**. Why isn't this just left up to the negotiations? Why do we have to get ourselves involved with interfering in the collective bargaining process?

Is it just to make it easier, so that there will be another item that does not have to be bargained with the employer?

Mr. **Young**. As Mr. Gold said, in effect, what we are saying in the support of this legislation, is that neither party in the collective bargaining can discriminate in the provision of the contract that they arrive at.

Mr. **Gold**. I think that it is important to make it plain that it is not a violation for an employer to say that, given the legal rules, he does no wish to have a disability plan.

It is not the intent of this legislation, as we understand it, if the employer provides for 4 weeks as the maximum amount of time they will cover any disability, to say that in the case of pregnancy it has to be 6 weeks. If it is 4 weeks, and that is the plan, that is the rule.

You have to look at the situation in the *General Electric* case, where they had a comprehensive plan which excluded only one item, and that was an item which affects only women as a matter of biology. We believe, we think, that the rationale is plain that that is no different than saying explicitly: "We exclude women."

That is what this legislation is to get at, and what the original legislation in title VII was to get at, was to deal with discrimination both over and subtle on the basis of race, sex, creed, and national origin.

Mr. **Sarasin**. I have a feeling you are trying to justify something that has some question, but I could be wrong.

Is it your contention, then, that it would be possible to satisfy this legislation by saying that all disabled people will be entitled to 4 weeks' disability, or 2 weeks' disability, 10 weeks disability?

Mr. **Gold**. Absolutely.

Mr. **Sarasin**. That would satisfy the problem of maternity with all the other?

Mr. **Gold**. This is not collective bargaining legislation. If the employer is not discriminating, but it is either because he is bargaining hard, or because his economic situation is that it is the best that he can do, he, therefore, has a limited plan, this legislation would not affect that.

What it deals with is cutting out a class of people because they are women.

Mr. **Sarasin**. Gentlemen, thank you very much.

Mr. **Hawkins**. Thank you, Mr. Sarasin.

Mr. Weiss?

Mr. Weiss. I really have only one question, which I think you probably have answered already.

Aren't you saying that there are matters which go beyond the normal labor-management relations concept in the same way that you have laws mandating safety conditions, or child labor conditions which could be left to bargaining, but as a matter of public policy we have decided that we are not going to let them be governed by collective bargaining?

Mr. Gold. Collective bargaining starts from the essential premises, where you cannot have a collective bargaining agreement for a $2 wage in this country, even if the employer is strong enough, and the union is so weak that that is the best you could get.

Under the Occupational Safety and Health Act, as you point out, you cannot bargain for unsafe conditions. We believe that this is precisely the same type of matter.

Mr. Hawkins. Before title VII was passed, it was my feeling that collective bargaining agreements would not discriminate against blacks, regardless of collective bargaining agreements.

As a coauthor of the bill that became title VII, and also as the author of the 1972 amendments, it was certainly never interpreted by me that the intent was to discriminate on the basis of sex, but prohibit sex discrimination. It fundamentally had nothing to do with collective bargaining per se.

When I introduced this bill at the request of many groups, I must confess that I was not thinking about collective bargaining agreements. It seems to me that it is public policy that was established by title VII.

It seems to me that the issue before this committee, is whether or not sex discrimination is to be tolerated under title VII. For this reason, and others, I have sympathy with collective bargaining agreements, however, I don't think that you can collectively bargain that which the public law prohibits you to do.

Would you care to comment on this?

Mr. Gold. I have nothing to add except we are in entire agreement. The labor movement supported title VII because our commitment is precisely that which you have just stated. We did nothing on the question of whether or not an individual could be discriminated against on any of the ground stated in title VII should be left to collective bargaining, as deeply as we believe in collective bargaining. But rather that this is a matter that ought to be taken out of collective bargaining and settled by public law.

It is important, I believe, in light of the discussion that we have had with Congressman Sarasin, to emphasize the point that this bill does not affect only those who are covered by collective bargaining agreements, but also affects the rest of employers and employees where there is no collective agreement. Its obligations are equal in both situations.

Mr. Young. Congressman, if I could just add one point.

I think, as Mr. Gold has said, we are in total agreement with you. As you know, we were in total agreement in the past legislation.

I think what we are saying basically is: (a) We do not consider this a change in collective bargaining. This is to make clear public policy that there shall not be discrimination. (b) We are saying that collective bargaining in no way should be looked upon as some sort of an obstacle to getting rid of discrimination in any form.

This is public policy. This would then be the situation. In any case where there is an agreement that has discrimination, that no longer is going to be permitted because of the Federal law.

Mr. HAWKINS. Thank you. I think that this completes the work of this panel. We wish to thank you for your presentation.

Our next panel, was scheduled for 11 o'clock. However, we are running a few minutes ahead of time. We will skip that panel temporarily, and take Mr. G. Brockwel Heylin, labor relations attorney, chamber of commerce, accompanied by Mr. Paul Jackson; Mr. Peter Thexton, Health Insurance of America, American Council of Life Insurance, Washington, D.C.

Gentlemen, we welcome you as a panel this morning. You may proceed in the order in which you were called, or as you so desire.

[Prepared statement of Mr. Heylin follows:]

PREPARED STATEMENT OF G. BROCKWEL HEYLIN, LABOR RELATIONS ATTORNEY, CHAMBER OF COMMERCE OF THE UNITED STATES

I am G. Brockwel Heylin, a Labor Relations Attorney with the Chamber of Commerce of the United States. Accompanying me today is Paul Jackson, an actuary with the Wyatt Company, who is an expert in the area of employee benefit programs. I appear before this Subcommittee on behalf of the Chamber which is the largest association of business and professional organizations in the United States. Principal spokesman for the American business community, the National Chamber represents over 3,500 trade associations and chambers of commerce. It has a direct membership of over 82,000 business firms. On behalf of the National Chamber, I wish to thank the Committee for this opportunity to present the Chamber's opposition to H.R. 5055, a bill to prohibit employment distinctions made on the basis of pregnancy, incluling employee ineligibility for disability benefits for maternity related purposes.

The issue before this Subcommittee is whether to treat a natural, healthy and typically voluntary condition, such as pregnancy, like abnormal and undesirable conditions such as illnesses and injuries. For the reasons that will be discussed in our statement, we think the answer must be "no".

PURPOSE AND EFFECT OF THE BILL

The bill is ostensibly designed to in effect, reverse the Supreme Court in which the present language of Title VII of the Civil Rights Act of 1964 was interpreted as not requiring the payment of sikness and accident disability *General Electric Co. et al v. Gilbert et al* (45 U.S. Law Week 4031 (1976) in benefits for pregnancy absences. H.R. 5055 does that, of course, but the effect of the bill goes beyond *Gilbert*.

OCCUPATIONAL HEALTH

For example, it requires that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes." This would prevent an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child.

Even though the prospective mother might arguably be considered to have assumed the risk by asking to work in such circumstances, injury to the fetus might give the child a cause of action against the employer who, under the bill, would be powerless to deny the work to the child's mother during the pregnancy.

MEDICAL PROBLEMS

Another effect of the bill would be to offer substantial opportunities for abuse of the protection H.R. 5055 provides. The most obvious abuse would be the fact that leave and payments for pregnancy might amount to severance pay, rather than disability pay, in many cases.

Studies show that 40–50% of females taking pregnancy leave do not return to work after their babies are born, whereas almost 100% of other workers taking disability leave *do* return to work. The pregnancy disability benefits would become a severance pay which other (non-pregnant) employees cannot receive.

The unique nature of pregnancy also will present problems for employers trying to control potential abuses. The fact that so many will no longer be in the workforce after giving birth could itself be the cause of abuse because an ex-employee has little to lose by claiming a disability where none exists.

Insurance industry sources tell us that due to the threat of malpractice actions, physicians are reluctant to reject a pregnant woman's claim of inability to work.

Even if an employer wanted to have the diagnosis of inability to work confirmed by its own doctor, by the time a company medical person could examine the woman, she might be in fact unable to work.

In any event, doctors generally think in terms of medical conditions, not in terms of work capabilities; thus they could unnecessarily restrict employment possibilities of pregnant workers.

During the postpartum healing period, repeated examinations to determine ability to work could substantially increase the risk of infection to the recovering mother. [Present practice is to examine the new mother six weeks after delivery, assuming there are no complications.] All these examinations, of course, would ultimately increase medical costs.

EXTENT OF ABSENCE/BENEFIT

The bill apparently allows an unlimited amount of absence for pregnancy related purposes. Theoretically, a person who becomes ill on her second day of pregnancy could expect months of disability leave and benefits.

The experience of one large employer with 11,000 employees, 40% of who are female with pregnancy disability coverage shows that the claim period may be longer than six weeks. Figures for 1976 showed the average claim period to be 13.2 weeks, and early 1977 figures initiated after controls against certain abuses were instituted, show a 7.5 week period.

Even an employer without a disability benefits plan but who allows leave for disability probably would be required under H.R. 5055 to give leave to, and keep a position open indefinitely for, a pregnant employee who cannot work.

In addition, employers not providing maternity coverage for employees while providing all other medical coverage would likely be required to furnish maternity benefits to employees as well.

In some cases, people would seek a job merely to ensure coverage of their maternity expenses, since 60 to 70 percent of the plans become effective on the first day of work. To overcome this threat to plan solvency, plans might exclude coverage of any disability for one year following initial employment.

These are just some of the effects of the bill, but we see other serious flaws in the approach of H.R. 5055. First, the cost of disability benefits for pregnancy would be considered. In fact, employers having a large proportion of female employees would face such a substantial increase in disability plan expenditures that such plans might be dropped or employers would avoid entering into new plans.

Second, the high cost of the benefit would either reduce other benefits or result in an increase in total benefit cost. A reduction in benefits could deprive both pregnant and non-pregnant workers of funds needed for illness and/or injuries, while providing money for a typically healthy condition—pregnancy. Providing the benefit through increases in total benefit cost could force prices higher, reducing the competitiveness of products or services in the market place.

Bureau of Labor Statistics data for 1975 showed 94,793,000 people in the U.S. workforce. Of those 37,087,000 were females and of those females 25,057,000 were of childbearing age, between 16–44. Actuarial figures show that the likelihood of a female of childbearing age actually have a child is about one in twenty annually.

Even though all women in that age group are not likely to give birth, disability insurance costs for groups greatly increase in proportion to the number of females in the workforce. The table below shows monthly rates for a typical disability plan paying $100 per week in an average workforce having 25 or more employees.

TABLE 1

Number of females in workforce (in percent)	Rate without pregnancy-disability [1]	Rate with 6 weeks of pregnancy disability [1]	Rate with unlimited pregnancy disability [1]
0 to 11	$8.00	$8.10	$8.30
21 to 31	9.20	9.80	11.00
41 to 51	10.50	11.60	13.80
71 to 81	12.50	14.30	17.90
91 to 100	13.70	15.90	20.30

[1] Assume average age distributions. As the age of female employees goes down, the rate goes up for pregnancy disability benefits.

Source: Aetna Manual for Disability Rates, August 1974.

Table 1 shows clearly that employers having a large proportion of female employees pay a high disability premium which would be even higher if the benefit were required for pregnancy leave. Some industries having a high proportion of women also tend to pay lower wages, and thus those employees would suffer a disproportionate injury if existing disability benefits were dropped or reduced leaving them to bear disability costs on their low wages. Denying a disability benefit to a higher paid employee does not have the adverse impact that denying such a benefit to a less well paid employee would have. The Chamber supports equal employment opportunity directed at ensuring females opportunities in all employment, including better paying jobs.

COST INCREASES DUE TO H.R. 5055

Not only would costs rise for employers having a substantial proportion of female employees, but the expense for medical and disability coverage would increase generally. Data collected for use during lower court proceedings in the *Gilbert* case showed that, for the plans in effect in 1973, the annual cost of adding maternity benefits to the sickness and accident disability income plans in effect in the United States would have been $1.35 billion. Another study estimated the annual cost of a 20 week maternity benefit at $1.62 billion. In addition, benefit data submitted by General Electric in the *Gilbert* case showed that benefits received by females cost 170% of the cost of the male benefit under the existing plan which did not cover pregnancy, but that cost of benefits for females would have been 210% if six weeks maternity income was provided and from 300–330% where full maternity coverage was provided. [Brief for General Electric Company, p. 8, 9, U.S. Sup. Ct. Nos. 74–1589, 1590.]

PAYMENT FOR COSTS

If H.R. 5055 is enacted, the anticipated increase in disability and medical costs would be at least 20% for an employer having a typical workforce.

For example, one large employer which recently added the benefit for employees at its corporate headquarters experienced an increase of 50¢ per month on a $2.95 base for disability coverage.

The additional costs for the benefit would have to be borne by males and by females not having childing by reducing the benefit package if the employer was unable to enlarge its contribution to the plan. Or, if the contribution could be increased, the employer would pass the higher costs along to its customers and the public.

GOVERNMENT INVOLVEMENT IN DETERMINING EMPLOYEE BENEFITS

H.R. 5055 injects the government into the process of free collective bargaining under which, up to now, the amount of wages and the array of fringe benefits has been determined by employer and employees. Thus, by supporting this legislation, organized labor frees itself from having to bargain for the benefit.

The amount and quality of employee benefits is typically determined in accordance with industry and competitive personnel practices by non-union employers, or through collective bargaining by unionized employers.

The National Labor Relations Act specifically forbids government determination of contract terms. [*H. K. Porter* v. *N.L.R.B.*, 397 U.S. 99 (1970)] H.R. 5055, however, mandates a fringe benefit for a certain group of workers. Thus, no longer can employers and employees flexibly fashion that selection of disability benefits which they believe will most appropriately meet the needs of that particular workforce.

For example, under present law, the disability plan can be as narrowly focused as desired. Thus, a program could be limited to injuries or certain illnesses, all other conditions being excluded. This makes it possible for an employer to reduce the costs of the plan. But the bill would attach expensive pregnancy disability requirements to all plans, no matter how limited the particular plan happens to be.

In some cases, the plan might cover pregnancy where it fails to include what people think of as conditions more typical of sickness and accident coverage.

It is true that the General Electric plan discussed in *Gilbert* covered virtually everything except pregnancy related conditions, but it is also true that many disability income plans are much less inclusive than the General Electric one. [Mandating more inclusive plans could force some employers to drop the existing plans altogether.]

PREGNANCY DISABILITY PROVISIONS IN EXISTING PLANS

Some employers do cover pregnancy absences in their disability plans. In 1973 about 40 percent of the U.S. workforce under age 65, some 32 million employees, was covered by sickness and accident disability insurance. The benefit periods varied from 13 weeks in 45 percent of the plans to 26 weeks in 50 percent of the plans or 52 weeks in 5 percent of the plans, but only 40 percent of the plans, covering 13 million employees, provided a pregnancy benefit, usually limited to six weeks.[1] (General Electric brief, p. 8, U.S. Sup. Ct. No. 74-1589.)

By imposing potentially high costs on holders of plans, H.R. 5055 acts as a disincentive for the other 60 percent of the employers to start a plan. The public interest would be better served by encouraging disability coverage rather than discouraging it.

The fact that some employers, usually large companies, have decided—and can afford—to provide pregnancy disability benefits does not mean that such benefits should be universally required by statute.

Lastly, some employers give pregnant employees leave for extended periods before and/or after pregnancy. The bill might be interpreted to limit pregnancy absences to periods of actual disability to the disadvantage of childbearing workers now eligible for this special leave.

CONCLUSION

The bill poses serious threats to the financial position of disability plans as well as potentially discouraging the creation of plans for employees who are not now covered. Serious questions concerning OSHA and potential abuses of the benefit also exist. For these reasons, the Chamber of Commerce of the United States is opposed to enactment of H.R. 5055.

STATEMENT OF G. BROCKWEL HEYLIN, LABOR RELATIONS ATTORNEY, CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. HEYLIN. My name is G. Brockwel Heylin. I am a labor relations attorney with the Chamber of Commerce of the United States. Accompanying me today is Paul Jackson, an actuary with the Wyatt Co., who is an expert in the area of employee benefit programs.

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[1] One employer of 1,000 workers, about 40% of whom are female, experienced a 13.2 week length of pregnancy disability benefit in 1976 and 7.5 weeks so far in 1977.

I appear before this subcommittee on behalf of the chamber which is the largest association of business and professional organizations in the United States. Principal spokesman for the American business community, the National Chamber represents over 3,500 trade associations and chambers of commerce. It has a direct membership of over 62,000 business firms.

On behalf of the national chamber, I wish to thank the committee for this opportunity to present the chamber's opposition to H.R. 5055, a bill to prohibit employment distinctions made on the basis of pregnancy, including employee ineligibility for disability benefits for maternity related purposes.

The issue before this subcommitee is whether to treat a natural, healthy and typically voluntary condition such as pregnancy, like abnormal and undesirable conditions such as illnesses and injuries. For the reasons that will be discussed in our statement, we think the answer must be "No."

The bill is ostensibly designed to, in effect, reverse the Supreme Court decision in *General Electric* v. *Gilbert et al*, in which the present language of title VII of the Civil Rights Act of 1964 was interpreted as not requiring the payment of sickness and accident disability benefits for pregnancy absences. H.R. 5055 does that, of course, but the effect of the bill goes beyond *Gilbert*.

For example, it requires that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes." This would prevent an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child.

Even though the prospective mother might arguably be considered to have assumed the risk by asking to work in such circumstances, injury to the fetus might give the child a cause of action against the employer who, under the bill, would be powerless to deny the work to the child's mother during the pregnancy.

Another effect of the bill would be to offer substantial opportunities for abuse of the protection H.R. 5055 provides. The most obvious abuse would be the fact that leave and payments for pregnancy might amount to severance pay, rather than disability pay, in many cases.

Studies show that 40 to 50 percent of females taking pregnancy leave do not return to work after their babies are born, whereas almost 100 percent of other workers taking disability leave do return to work. The pregnancy disability benefits would become a severance pay which other employees cannot receive.

The unique nature of pregnancy also will present problems for employers trying to control potential abuses. The fact that so many will no longer be in the work force after giving birth could, in itself, be the cause of abuse because an ex-employee has little to lose by claiming a disability where none exists.

Insurance industry sources tell us that due to the threat of malpractice actions, physicians are reluctant to reject a pregnant woman's claim of inability to work. Even if an employer wanted to have the diagnosis of inability to work confirmed by its own doctor, by the time a company medical person could examine the woman, she might be in fact unable to work.

In any event, doctors generally think in terms of medical conditions, not in terms of work capabilities. Thus they could unnecessarily restrict employment possibilities of pregnant workers.

During the postpartum healing period, repeated examinations to determine ability to work could substantially increase the risk of infection to the recovering mother. All these examinations, of course, would ultimately increase medical costs.

The bill apparently allows an unlimited amount of absence for pregnancy related purposes. Theoretically, a person who becomes ill on her second day of pregnancy could expect months of disability leave and benefits.

The experience of one large employer with 11,000 employees, 40 percent of whom are female, with disability coverage shows that the claim period may be longer than 6 weeks. Figures for 1976 showed the average claim period to be 13.2 weeks, and early 1977 figures, after controls against abuses were instituted, show a 7.5 week period for pregnancy disability.

Even an employer without a disability benefits plan but who allows leave for disability probably would be required under H.R. 5055 to give leave to, and keep a position open indefinitely for, a pregnant employee.

In addition, employers not providing maternity coverage for employees while providing all other medical coverage would likely be required to furnish maternity benefits to employees as well.

In some cases, people would seek a job merely to ensure coverage of their maternity expenses, since 60 to 70 percent of the plans become effective on the first day of work. To overcome this threat to plan solvency, plans might exclude coverage of any disability for 1 year following initial employment.

These are just some of the effects of the bill, but we see other serious flaws in the approach of H.R. 5055. First: The cost of disability benefits for pregnancy would be considerable. In fact, employers having a large proportion of female employees would face such a substantial increase in disability plan expenditures that such plans might be dropped or employers would avoid entering into new plans.

Second: The high cost of the benefit would either reduce other benefits or result in an increase in total benefit cost. A reduction in benefits could deprive both pregnant and nonpregnant workers of funds needed for illness and/or injuries, while providing money for a typically healthy condition—pregnancy. Providing the benefit through increases in total benefit cost could force prices higher, reducing the competitiveness of products or services in the marketplace.

The Bureau of Labor Statistics data for 1975 showed 94,793,000 people in the U.S. workforce. Of those, 37,087,000 were females and those females 25,057,000 were of childbearing age, between 16 and 44.

Actuarial figures show that the likelihood of a female of childbearing age actually having a child is about 1 in 20 annually. Even though all women in that age group are not likely to give birth, disability insurance costs for groups greatly increase in proportion to the number of females in the workforce.

I have enclosed in my testimony a table showing the increase of rates as pregnancy disability is added, and as the number of females in the workforce increases. Table 1 shows clearly that employers having a large proportion of female employees pay a high disability premium which would be even higher if the benefit were required for pregnancy leave.

[The table referred to follows:]

TABLE 1

Number of females in workforce (in percent)	Rate without pregnancy-disability [1]	Rate with 6 weeks of pregnancy disability [1]	Rate with unlimited pregnancy disability [1]
0 to 11	$8.00	$8.10	$8.30
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[1] Assume average age distributions. As the age of female employees goes down, the rate goes up for pregnancy disability benefits.

Source: Aetna Manual for Disability Rates, August 1974.

Mr. Heylin. The chamber believes that equal opportunity is the appropriate vehicle for assuring females better paying jobs. Unfortunately, however, some industries having a high proportion of women also tend to pay lower wages, and thus those employees would suffer a disproportionate injury if existing disability benefits were dropped or reduced leaving them to bear disability costs on their low wages.

Denying a disability benefit to a higher paid employee does not have the adverse impact that denying such a benefit to a less well paid employee would have.

Not only would costs rise for employers having a substantial proportion of females employees, but the expense for medical and disability coverage would increase generally. Data collected for use during lower court proceedings in the *Gilbert* case showed that, for the plans in effect in 1973, the annual cost of adding maternity benefits to the sickness and accident disability income plans in effect in the United States would have been $1.35 billion. Another study estimated the annual cost of a 20-week maternity benefit at $1.62 billion.

In addition, benefit data submitted by General Electric in the *Gilbert* case showed that benefits received by females cost 170 percent of the cost of the male benefit under the existing plan which did not cover pregnancy, but that cost of benefits for females would have been 210 percent if 6 weeks maternity income was provided and from 200 to 330 percent where full maternity coverage was provided.

If H.R. 5055 is enacted, the anticipated increase in disability and medical costs would be at least 20 percent for an employer having a typical workforce.

For example, one large employer which recently added the benefit for employees at its corporate headquarters experienced an increase of 50 cents per month on a $2.95 base for disability coverage.

The additional costs for the pregnancy disability benefit would have to be borne by males and by females not having children by reducing the benefit package if the employer was unable to enlarge its contribution to the plan. Or, if the contribution could be increased, the employer would pass the higher costs along to its customers and the public.

H.R. 5055 injects the Government into the process of free collective bargaining under which, up to now, the amount of wages and the array of fringe benefits has been determined by employer and employees. Thus, by supporting this legislation, organized labor frees itself from having to bargain for the benefit.

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The National Labor Relations Act specifically forbids Government determination of contract terms. [*H. K. Porter* versus *NLRB*, 397 U.S. 99 (1970)] H.R. 5055, however, mandates a fringe benefit for a certain group of workers. Thus, no longer can employers and employees flexibly fashion that selection of disability benefits which they believe will most appropriately meet the needs of that particular work force.

For example, under present law, the disability plan can be as narrowly focused as desired. Thus, a program could be limited to injuries or certain illnesses, all other conditions being excluded. This makes it possible for an employer to reduce the costs of the plan. But the bill would attach expensive pregnancy disability requirements to all plans, no matter how limited the particular plan happens to be.

In some cases, the plan might cover pregnancy where it fails to include what people think of as conditions more typical of sickness and accident coverage.

It is true that the General Electric plan discussed in *Gilbert* covered virtually everything except pregnancy related conditions, but it is also true that many disability income plans are much less inclusive than the General Electric one.

Some employers do cover pregnancy absences in their disability plans. In 1973 about 40 percent of the U.S. workforce under age 65, some 32 million employees, was covered by sickness and accident disability insurance. The benefit periods varied from 13 weeks in 45 percent of the plans, to 26 weeks in 50 percent of the plans, and 52 weeks in 5 percent of the plans, but only 40 percent of the plans, covering 13 million employees, provided a pregnancy benefit, usually limited to 6 weeks.

By imposing potentially high costs on holders of plans, H.R. 5055 acts as a disincentive for the other 60 percent of the employers to start a plan. The public interest would be better served by encouraging disability coverage rather than discouraging it.

The fact that some employers, usually large companies, have decided, and can afford, to provide pregnancy disability benefits does not mean that such benefits should be universally required by statute.

Last: Some employers give pregnant employees leave for extended periods before and/or after pregnancy. The bill might be interpreted to limit pregnancy absences to periods of actual disability to the disadvantage of childbearing workers now eligible for this special leave.

The bill poses serious threats to the financial position of disability plans as well as potentially discouraging the creation of plans for employees who are not now covered. Serious questions concerning OSHA and potential abuses of the benefit also exist.

For these reasons, the chamber of commerce of the United States is opposed to enactment of H.R. 5055.

With regard to section II, although we just saw it for the first time about 10 minutes ago, we would oppose that because what it says to us is that you can have anything you want in your disability plan as long as pregnancy coverage is included.

If an employer knows that he can never get out of a plan or change benefits if he starts one, few employers would ever start a new plan. We suggest that an employer might well decide to give employees certain supplements, and tell them to get their own disability coverage.

I believe that Mr. Jackson has some testimony on statistical data.

Mr. HAWKINS. Mr. Jackson.

STATEMENT OF PAUL JACKSON, ACTUARY, WYATT COMPANY, APPEARING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. JACKSON. I am Paul Jackson, and I am a consulting actuary with the Wyatt Co., and I was one of the actuaries who prepared cost estimates for the *Gilbert* case.

Earlier, someone indicated that those costs were based on 30 weeks of maternity and 30 weeks of benefits. That is not the case. The estimate was based on something in order of 17 weeks average absence.

I might state that my cost estimates for that case were based on my best judgment as an actuary and I was not biased one way or the other. I still stand on them as being reasonable.

For example, the 1975 statistical supplement for the railroad retirement system published the results under that system for accident and sickness, including maternity benefits, and the average number of days paid was 105, so the maternity payments averaged 15 weeks.

Within the last year or two, we have obtained quotations from insurance companies to change weeks of maternity benefits to full coverage. The average rates increased by a factor of about 2.5 times, from 28 cents to 69 cents, and 23 cents to 68 cents, and so on. This being 15 weeks again.

One further bit of evidence that has been developed recently, the New York Insurance Department conducted a study published in June of 1976 on disability income insurance cost differentials between men and women to determine whether the cost differentials were due to underwriting matters or whether they could really be traced to the difference in sex.

Their conclusion was that six is a major factor affecting the cost of disability, and that the cost relative to male cost—there are for coverage with maternity benefits excluded—were 143 percent in the 1920's, 222 percent in the 1930's, and 190 percent in the 1940's, and so on.

The only age group where the females cost less than the males in sickness and accident coverage is in the age range from 60 to 69, where their cost was only 98 percent of the male costs.

It was mentioned earlier today that social insurance programs in various countries, do provide maternity benefits. This is true. Perhaps, other countries do this, but there is not one single country that treats maternity as though it were a sickness. Everyone of them provides sickness benefits, as a typical example, for 26 weeks while maternity benefits might be provided for 4 weeks before delivery and 8 weeks after, and so on.

The statistics that have been developed over the years, show that when no maternity benefits are provided, as in the *GE* case, the cost for $10 of weekly benefits for a female employee averages about 170 or 180 percent of the cost for a male employee. With the 6-week maternity benefit, it is about 240 or 250 percent of the male cost. With unlimited benefits, or full maternity benefits, it is about 300 percent or three times the male cost.

Not all disabilities are covered under these programs. There is reference made occasionally to these plans as disability plans. The General Electric plan is a sickness and accident plan. There are also workers compensation plans that cover another type of disabilities.

There are accident-only plans that cover those limited types of disability. None of these plans, to my knowledge, cover certain common causes of disability such as incompetence or senility. These are simply left out. They are not insurable.

Over the years, the insurance industry has always excluded maternity benefits under individual policies. If there is a buck to be made, I am sure that the insurance companies would do so. They have not been able to market disability policies that provide maternity benefits because the anti-selection on the part of the prospective insured could be expected to be so costly that it would price everyone out of the market except one who expects to have a baby.

In summary, I would merely state that having reviewed the cost estimates in the *Gilbert* case, I find they are as valid today as they were. Adjustments would have to be made for cost of living and for the rise in the average wage, and average benefits.

Mr. HAWKINS. Thank you, Mr. Jackson.

Next we will hear from Mr. Peter Thexton.

STATEMENT OF PETER M. THEXTON, ASSOCIATE ACTUARY, HEALTH INSURANCE ASSOCIATION OF AMERICA, AMERICAN COUNCIL OF LIFE INSURANCE

Mr. THEXTON. Thank you, Mr. Chairman. With me today are Mr. Thomas Calluli, associate counsel of the health insurance, and Mr. Richard Minck, vice president and actuary of American Council of Life Insurance.

My name is Peter M. Thexton. I am associate actuary of the Health Insurance Association of America and a member of the American Academy of Actuaries. I appear here today on behalf of the American Council of Life Insurance and the Health Insurance Association of America. The combined membership of these associations write 90 percent of the total private health insurance business written by insurance companies in the United States.

We are pleased to appear here today in response to a request from the subcommittee for our estimate of the cost impact of the provisions of H.R. 5055. In effect, these provisions require that all employer sponsored disability income plans and plans which provide reimbursement for hospital and medical expenses provide benefits for pregnancies on the same basis as illness.

Our estimate at this time is that the proposed legislation would result in an additional expenditure for calendar year 1978 of $1.7 billion or about 6 percent more than is currently being spent for disability income plans and hospital and medical expense plans.

Of the total, we estimate that an additional $0.6 billion will be spent for disability income plans and $1.1 billion for hospital and medical expense plans, excluding Blue Cross and other such plans.

Details with respect to the foregoing estimates are presented in the attached tables. Let me highlight the principal elements of our calculations.

Disability income plans—the elements of the disability income calculation are the frequency of pregnancy, the average number of weeks of disability caused by pregnancy, the average weekly benefit, and the percent of all workers who are female.

We have made appropriate adjustments for variations in frequency of pregnancy between working and nonworking women, and differences in earnings between women and men as they exist in the economy.

As indicated in table 1, we estimate that there are presently 32 million female workers, excluding agricultural self-employed, unpaid family and private household workers. The number of births which can be expected among such workers in 1978 is 1,358,000.

In table 2, we estimate that approximately two-thirds of the working population are covered by short-term disability income benefits. The overall average weekly wage for all employees of private establishments we estimate to be about $194 per week.

For industries most likely to employ a high percentage of women, the average weekly wage ranges from $147 to $175 per week. The average weekly wage for women likely to be affected by this legislation in these industries, however, we estimate to be about $149 per week.

The actual details of our calculation are shown in table 3. Yesterday we provided a copy of this testimony, and you may have noticed that we have cleaned up the grammar a little bit, I have here an additional paragraph which is not included, but which will be included in the corrected copy, with your permission.

Mr. HAWKINS. Without objection, the corrected copy will be inserted at this point in the record.

[Corrected statement referred to follows:]

STATEMENT

OF THE

AMERICAN COUNCIL OF LIFE INSURANCE
AND THE
HEALTH INSURANCE ASSOCIATION OF AMERICA

ON

H. R. 5055

PRESENTED BY

PETER M. THEXTON, ASSOCIATE ACTUARY
HEALTH INSURANCE ASSOCIATION OF AMERICA

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
OF THE
UNITED STATES HOUSE OF REPRESENTATIVES

APRIL 6, 1977

AMENDED APRIL 12, 1977

My name is Peter M. Thexton. I am Associate Actuary of the Health Insurance Association of America and a Member of the American Academy of Actuaries. I appear here today on behalf of the American Council of Life Insurance and the Health Insurance Association of America. The combined membership of these associations write 93% of the total private health insurance business written by insurance companies in the United States.

We are pleased to appear here this morning in response to a request from the Subcommittee for our estimate of the cost impact of the provisions of H. R. 5055. We appreciate the opportunity to present this amended version with additional calculations, submitted April 15, 1977.

In effect, the provisions of H. R. 5055 require that all employer sponsored disability income plans and plans which provide reimbursement for hospital and medical expenses provide benefits for pregnancies on the same basis as for illness.

Our estimate at this time is that the proposed legislation would result in an additional expenditure for calendar year 1978 of $1.6 billion, or about 6% more than is currently being spent for disability income plans and hospital and medical expense plans. Of the total, we estimate that an additional $0.6 billion will be spent for insurance company and uninsured formal sick leave, disability income plans, and $1.0 billion for insurance company hospital and medical expense plans (excluding Blue Cross and other such plans). This does not take account of the effect of certain recent state laws, decisions and regulations, the effectiveness of which is in dispute. We comment further on this in a section at the end of our statement, and in a separate statement submitted with this statement in response to the Subcommittee's request.

Details with respect to the foregoing estimates are presented in the attached tables. Let me highlight the principal elements of our calculations.

Disability Income Plans

The elements of the disability income calculation are the frequency of pregnancy, the average weekly benefit, and the percent of all workers who are female and insured, and the average number of weeks of disability caused by pregnancy. We have made appropriate adjustments for variations in frequency of pregnancy between working and non-working women and for differences in average earnings between men and women.

As indicated in Table 1, we estimate that there are presently 32 million female workers, excluding agricultural, self-employed, unpaid family and private household workers. The number of births which can be expected among such workers in 1978 is 1,358,000.

In Table 2, we estimate that approximately two-thirds of the working population are covered by short-term disability income benefits. The overall average weekly wage for all employees of private establishments we estimate to be about $194 per week. For industries most likely to employ a high percentage of women, the average weekly wage ranges from $147 to $175 per week. The average weekly wage for women likely to be affected by this legislation in these industries, however, we estimate at about $149 per week.

The actual details of our calculation are shown in Table 3.

We point in particular to our estimate that the average benefit period of disability caused by pregnancy is 11.3 weeks. This number is derived from preliminary data arising out of the Hawaii Temporary Disability Insurance Law and a few private group plans not having special pregnancy limits. It is a reasonable estimate of the sort that actuaries would have to use in considering premium rates for the additional coverage. The applicability of clinical medical estimates to insurance plans, must be evaluated in the light of the effect of new disability income benefits payable to pregnant workers as a result of this bill. The 11.3 week experience compared to the 6 week clinical estimate in other testimony, illustrates this point.

The additional cost for including maternity benefits in group disability income plans is estimated to be $611 million, or an increase of about 10% of the current expenditures for accident and sickness disability income benefits.

Hospital-Medical Expense Plans

The elements of our calculation for hospital-medical expense plans include the frequency of hospitalization for maternity, average duration of stay, the cost per day in the hospital, the average physician's bill for obstetrics and the number of women of child-bearing age in the population. Our data were compiled in connection with the New York mandatory maternity insurance benefit law. Those data are applicable for costs in the State of New York and we adjusted them downward to compensate for the difference in benefits and relative costs between New York and nationwide.

Based on these calculations, we estimate that the additional cost of including maternity coverage on the same basis as coverage for sickness in group medical expense plans administered by insurance companies is $1.1 billion, or 5.4% in excess of what is currently being spent for this benefit. This estimate excludes Blue Cross, Blue Shield, uninsured plans and other independent plans. The details are shown in Table 4.

General

Let me add that we have done our best to provide the Subcommittee with realistic estimates of the cost implications of H. R. 5055. These estimates are necessarily broad and indicate primarily the order of magnitude of the answers. We have avoided the kind of conservatism normally utilized to be confident of adequate premiums; reality was the watchword. Even so, time was short. Any number within 20% of our total would be just as good but beyond that range would be seriously questionable, in our judgement.

The Subcommittee requested that we prepare estimates of the portion of our total which might be inapplicable if, and as, new state laws, decisions and regulations become effective. We are working on a table of distribution of the costs by state which may serve this purpose. In the meantime, for New York, the estimates of additional cost which are included in the aggregate calculations are $100 million of medical and $40 million of disability income. For Hawaii, the estimates are $2 million medical and $1 million disability income.

The New Jersey and new California disability income coverages are included in the estimate of current coverage which is a part of lines (8) through (12) of Table 3.

It is not clear to us that laws, decisions and regulations in other states have had or will have any significant effect on the employer practices or insurance coverages, and, therefore, we have not deducted any amounts for such possible effects.

Subtracting the approximately $100 million for New York and Hawaii from the $1.7 billion total leaves $1.6 billion.

Let me conclude by saying we appreciate this opportunity to provide this information and we are willing to answer any questions with respect to the cost implications of this bill.

TABLE 1

EXPECTED BIRTHS

Employed Persons excluding Agricultural, Self-employed, Unpaid Family and Private Household Workers

Age	(1) Female Workers	Population (2) Birth Rate	Expected Births
16 to 19 Years	2,768,000	59.7	165,000
20 to 24	5,313,000	120.7	641,000
25 to 34	8,160,000	87.4	713,000
35 to 44	5,950,000	13.3	79,000
45 and over	9,812,000	(3)	-
Total	32,003,000		1,598,000

Allowance for lower birth rates among employed = 15%

Expected Births among employees 1,358,000

(1) Source - U.S. Dept. of Labor - Employment and Earnings, March 1977, Vol. 24 No. 3 Table A-23

(2) 1975 Statistical abstract. Rates are per 1,000 females.

(3) Less than 1 per 1,000

TABLE 2

INCOME PROTECTION COVERAGE

1.	Persons Protected for Short-Term Benefits - Dec. 1975 (1)	
	a. Group Policies	28,607,000
	b. Formal Paid Sick Leave Plans	19,400,000
	c. Other	2,500,000
	Total	50,507,000
2.	Employed Persons - November 1975 (2)	74,660,000
3.	Percent of Employed with Short-Term Benefits (1) ÷ (2)	68%

		February 1977 (3)	Calendar 1978 (4)
4.	Gross Weekly Earnings		
	a. Total Private	$ 182.16	$ 194.00
	b. Wholesale & Retail Trade	138.36	147.35
	c. Finance, Insurance & Real Estate	164.72	175.11
	d. Services	153.77	163.77
	e. Weighted Average of b, c and d	149.16	158.86

(1) Source Book of Health Insurance Data 1976-1977, p. 30

(2) U.S. Dept. of Labor - Employment & Earnings, Vol. 22 No. 6 Table A-22

(3) " " " " " " Vol. 24 No. 3 " C-1

(4) 106.5% of Feb. 1977 averages, average increase from Feb. 1976 to Feb. 1977.

TABLE 3

COSTS FOR INCOME BENEFITS FOR PREGNANCY UNDER SHORT-TERM INCOME PLANS

1.	Expected Births among employees - Table 1	1,358,000
2.	Percent of employees with Short-Term Benefits - Table 2 (3)	68%
3.	Expected Births among Employees with Short Term Benefits (1) x (2)	923,000
4.	Average Weekly Wage applicable to (3) - Estimated as 94% of Table 2, line (4) (e)	$149
5.	Average Duration of Pregnancy Disability Benefits*	11.3 weeks
6.	Average Percent Benefits Currently Paid - Estimated	60%
7.	Total Costs - Annual Basis (3) x (4) x (5) x (6)	$932 million
8.	Percentage of Employees with Short-Term Benefits that provide Maternity, including all California - Congressional Record, S4403	60%
9.	Average Weekly Wage applicable to (8) - Estimated	$156
10.	Average Duration of Pregnancy Disability Benefits Provided	6.2 weeks
11.	Average Percentage Benefits Currently Paid - Estimated	60%
12.	Total Current Costs (3) x (8) x (9) x (10) x (11)	$321 million
13.	Additional Costs to Income Benefits for Pregnancy - Annual Basis (7) - (13)	$611 million

* Based on experience under Hawaii compulsory cash sickness plans and some other privately insured group policies, having a one week elimination period and a 26 week or longer maximum benefit period.

TABLE 4

COSTS FOR HOSPITAL AND MEDICAL EXPENSE BENEFITS FOR PREGNANCY HOSPITAL AND MEDICAL EXPENSE BENEFIT PLANS ADMINISTERED BY INSURANCE COMPANIES

			$ Million
(1)	Group Premiums in 1975		$ 13,656
(2)	Project to 1978 at 15% per year		$ 20,757
(3) (a)	Pregnancy benefits currently provided as a % of current total	5.2%	
(b)	Cost for pregnancy benefits mandated by Chapter 843 of New York Laws of 1976, as a % of current total	11.1%	
(c)	Increase in New York, (4) - (3)	5.9%	
(d)	Adjustment for unlimited hospital days instead of 4 day maximum (3.8 average ÷ 3.6 average) and higher relative level of current U.S. benefits compared to N.Y. benefits (÷ 1.15), net increase	5.4%	
4.	(2) x (3) (d)		$ 1,120

Notes

(1) Source: Annual Survey of HIAA published in Source Book of Health Insurance 1976-77, page 52

(2) Rough projection based on trends of last two years.

(3) Based on unpublished survey of six of eight largest insurers of persons in New York State for hospital and medical expenses. These insurers write about one-half of the total health insurance written in New York by insurance companies.

Mr. THEXTON. We show that the average benefit period of disability caused by pregnancy is 11.3 weeks. This number is derived from preliminary data arising out of Hawaii temporary disability insurance law, and a few private plans not having special pregnancy limitations.

It is a reasonable data base estimate of the sort that actuaries would have to use to set premium rates for the additional coverage.

The additional cost for including maternity benefits in disability income plans is estimated in table 3 to be $611 million, or an increase of about 10 percent of the current expenditures for accident and sickness disability income benefits.

Hospital-medical expense plans—the elements of our calculations for hospital-medical expense plans include the frequency of hospitalization for maternity, average duration of stay, the cost per day in the hospital, the average physician's bill for obstetrics and the number of women of childbearing age in the population.

Our data were compiled in connection with the New York mandatory maternity insurance benefit law. Those data are applicable for costs in the State of New York and we adjusted them downward to compensate for the difference in benefits and relative costs between New York and nationwide.

Based on these calculations, we estimate that the additional cost of including maternity coverage on the same basis as coverage for sickness in medical expense plans is $1.1 billion or 5.4 percent in excess of what is currently being spent for this benefit.

This estimate excludes Blue Cross and Blue Shield, uninsured plans, and other independent plans.

Let me conclude by saying that we have done our very best to provide the subcommittee with estimates of the cost implications of H.R. 5055. We appreciate this opportunity to provide this information and are willing to answer any questions with respect to the cost implications of the bill.

Mr. HAWKINS. Mr. Thexton, do I understand that you are estimating the additional costs to be in the neighborhood of $1.1 billion. Does that exclude costs in the States that are already providing maternity disability benefits, or are you adding that on to those States that are already providing it?

Mr. THEXTON. The only State that requires these benefits is New York, unless Hawaii also does.

Mr. HAWKINS. The testimony was that 14 States have laws operating, but I don't know to what extent they operate at the same level. But the testimony before the subcommittee is that there are 14 States, where I assume there are some plans already in operation.

Are you considering States in which plans are already in operation, which would not really be affected substantially by the passage of this bill.

Mr. THEXTON. I will have to get back to you in response to this question. I just don't know.

Mr. HAWKINS. If you would care to submit some additional testimony which will at least reflect, in your cost estimates, some consideration of the States that already have plans in operation, the subcommittee will keep the record open for that information.

[Information requested follows:]

SUPPLEMENTAL STATEMENT

OF THE

AMERICAN COUNCIL OF LIFE INSURANCE
AND THE
HEALTH INSURANCE ASSOCIATION OF AMERICA

ON

H. R. 5055

PRESENTED TO THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
OF THE
UNITED STATES HOUSE OF REPRESENTATIVES

APRIL 15, 1977

The Subcommittee has asked us if our estimate of the effect of this Bill includes those states in which new laws, decisions and regulations appear to have imposed the cost effect we have been discussing.

In our amended statement we indicate the portion of our initial submission which is for New York and Hawaii, and we deducted these amounts. The effectiveness of new developments in New York is fairly clear.

For California, New Jersey and Rhode Island our estimates already included the effect of the limited pregnancy benefits prescribed there.

In other states, affect of the laws, decisions and regulations related to disability income and/or hospital medical benefits, for pregnancy, is not clear. The insurance industry has not received a significant volume of additional requests from employers for these benefits in these states. Even if the effect is complete coverage in the nine other states mentioned in other testimony to the Subcommittee, which we doubt because of the low volume of coverage requests, our estimate would be reduced by $100 million for disability income or $184 million for hospital-medical, leaving total increases of $.5 billion for disability income and $.8 billion for hospital-medical, a total of $1.3 billion.

ESTIMATED INCREASE IN COST BY STATE AS A RESULT OF H. R. [illegible]

Includes effect of California, Hawaii, New Jersey, New York and Rhode Island Disability Income benefits laws and decisions, and includes effect of Hawaii and New York Hospital-Medical benefits laws. Ins. Co. includes all plans administered by insurance companies.

State	Ins. Co. Hosp-Med	Ins. Co. & Pd. Sick Lv. Dis. Ins.
Alabama	12	7
* Alaska	2	1
Arizona	14	8
Arkansas	7	4
California	137	89
Colorado	13	7
* Connecticut	24	13
Delaware	2	1
* Dist. of Col.	8	4
Florida	39	21
Georgia	29	16
Hawaii	0	0
Idaho	3	2
Illinois	91	50
Indiana	36	19
Iowa	12	7
* Kansas	9	5
Kentucky	11	6
Louisiana	16	9
Maine	4	2
Maryland	18	10
Massachusetts	30	16
* Michigan	60	33
Minnesota	23	13
Mississippi	7	4
Missouri	27	18
* Montana	3	2
Nebraska	6	3
Nevada	5	3
New Hampshire	3	2
New Jersey	34	18
New Mexico	5	3
New York	0	0
No. Carolina	22	12
No. Dakota	2	1
Ohio	72	39
Oklahoma	10	5
Oregon	10	5
* Pennsylvania	56	30
Rhode Island	2	1
So. Carolina	11	6
* So. Dakota	2	1
Tennessee	19	11
Texas	56	30
Utah	5	3
Vermont	2	1
Virginia	20	11
Washington	16	9
West Virginia	8	4
* Wisconsin	20	11
Wyoming	1	1
Total U.S.	1,624	970

* In these states, laws, decisions or regulations may have already required some or all of these costs.

Chamber of Commerce of the United States
NATIONAL ECONOMIC DEVELOPMENT GROUP
202-659-6120
1615 H STREET, N.W.
WASHINGTON, D.C. 20062

April 20, 1977

The Honorable Augustus Hawkins
Chairman
Subcommittee on Employment Opportunities
House Committee on Education and Labor
U.S. House of Representatives
Washington, D. C.   20515

Re: Supplement to Testimony of Chamber of Commerce of the United States on H.R. 5055/6075

Dear Mr. Chairman:

Since our testimony before the Subcommittee on April 6, we have made an attempt to gather additional information on cost experiences in states which mandate pregnancy disability coverage. The enclosed letter (Attachment A) from Paul Jackson concludes that an average increase in costs of at least 20% where pregnancy disability coverage is required is likely based on the Hawaiian experience. For your further information, I have enclosed an excerpt (Attachment B) from the Federal Bar Association "Employment Topics and Commentaries" newsletter for March 1977 listing the current legal status of some state pregnancy disability requirements. Generally, the requirements either have not reached final court resolution or the requirement is too new to produce reliable and accurate cost experience.

Some questions at the April 6 hearing were directed at ascertaining the average length of pregnancy disability. In her Supplemental Supreme Court brief in the Gilbert case, Ruth Weyand reproduced (in Appendix F) the 1973-75 experience of the Xerox Corporation pregnancy disability program. (Brief, page 25a) Disability days ranged from 10.7 weeks in 1973 and 12 weeks in 1974, to 11.5 weeks in 1975, all substantially longer than the supporters of H.R. 5055 anticipate.

One of the major problems employers will face if H.R. 5055/6075 becomes law will be determining the point at which a pregnant employee becomes unable to work. The legislation provides that employers must provide disability leave and/or pay to pregnant employees on thesame basis as other persons unable or able to work. Thus, employers who grant females six weeks leave and disability pay under voluntary plans now--without a showing of actual disability--would be hard pressed to explain under H.R. 5055/6075 why one group of employees is entitled to leave and benefits without proving disability. Pregnant employees would have to prove disability, and some doctors allow their patients to work virtually up to the day of delivery, while others may urge long "rests"before and after delivery. Thus, deciding the actual period of disability could become a very difficult experience for both employers and pregnant employees.

Lastly, although I have not seen the transcript, I may have cited our testimony as including cost figures under a state mandated plan. Although one set of figures (disability duration on page 3) did come from a state with mandated coverage (California), the cost data cited on page 6 is from a voluntary plan in a state that does not require such coverage.

For your information, I have also enclosed for the record a copy of an article on pregnancy disability pay from the Business Insurance magazine of March 21, 1977 entitled "Pregnancy Disability Pay Is Coming–Eventually," (Attachment C). The article points out that providing full maternity disability coverage would cost each citizen $6.50!

I hope this information is of interest to you. If we can be of additional assistance, please be in touch.

Very truly yours,

G Brockwel Heylin

G. Brockwel Heylin
Labor Relations Attorney
(202) 659-6103

Enclosures

ATTACHMENT A

BOSTON
CHICAGO
CLEVELAND
DALLAS
DETROIT
FORT WORTH
HONOLULU
HOUSTON
LOS ANGELES
MINNEAPOLIS-
ST. PAUL

THE *Wyatt* COMPANY

ACTUARIES AND CONSULTANTS

PENSION PLANS · EMPLOYEE BENEFITS · DIRECT COMPENSATION · INTERNATIONAL BENEFITS · EMPLOYEE COMMUNICATIONS · RISK MANAGEMENT

1850 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

[illegible]

MIAMI
NEW YORK
ORLANDO
PHILADELPHIA
SAN FRANCISCO
WASHINGTON

MONTREAL
OTTAWA
TORONTO
VANCOUVER

April 13, 1977

Mr. G. Brockwel Heylin
Labor Relations Attorney
Chamber of Commerce of the
United States
1615 H Street, N.W.
Washington, D. C. 20006

Re: H.R. 5055

Dear Mr. Heylin:

You had asked for information regarding the added cost of providing disability income benefits under sickness and accident policies for normal maternity cases in those states which have recently required the inclusion of such coverage. In Hawaii, where it has been suggested that there was no added cost, the Travelers Insurance Company reported in a letter dated September 30, 1976 that with annual Hawaii TDI benefit payments running about $600,000 per year, 17.0% of total benefit payments were attributable to pregnancy in 1974, 18.5% in 1975, and 21.6% in 1976. The Aetna Life Insurance Company, with about a quarter million dollars of annual claims, reported maternity claims at 8.8% of total claims in 1973 (regular maternity was added on May 8, 1973; plans previously covered complications of pregnancy only). In 1974, maternity claims amounted to 26.6% of the total, and in 1975, 26.7%. Finally, the Metropolitan Life Insurance Company reported its experience on their largest group case covered under the Hawaii TDI law. Maternity claims amounted to 10.93% of total benefits in 1973, 29.26% in 1974, 25.0% in 1975, and 20.8% in 1976. The Metropolitan also included the experience of an additional firm for which during the first eight months of 1976, maternity claims amounted to 47.74% of total claims. The foregoing facts were included in a reply brief for General Electric on re-argument before the Supreme Court of the Gilbert Case. They suggest an increase in disability costs on the order of magnitude of 20% for the average employer.

You also wondered about the reference to actuaries basing disability costs on a 1947 table. The 1947-49 table of male experience is used as a standard against which current experience is measured. Female tabular claim factors used with that standard were based on 1957 experience. In developing cost estimates, however, the most recent experience in the Reports of the Society of Actuaries would be used. For example, in developing figures in mid-1973 for the General Electric case, I used experience from the 1971 Reports of the Society of Actuaries which included experience for policy years 1968, 1969 and 1970. That experience was then adjusted to reflect an estimated decline in the birth rate which had taken place up through mid-1973. Similarly, current estimates would be based on the 1975 Reports of the Society of Actuaries.

The 1957 female experience indicated that the cost of a plan with six-week obstetrical benefits for a female employee would run about 215% of the cost for a male employee. The 1975 Reports, however, show that this difference in cost is too small since the ratio of current costs to the standard factors runs about 95% for all-male groups to perhaps 115% for all-female groups. Thus, based on the most recent experience, the 215% factor would become about 260% (i.e., 215 x 115/95). The point is, however, that current costs are not estimated on the basis of 1947 tables. These tables are merely used as standards to measure relative costs of different plans. To object to the age of such a standard might best be compared to objecting to the use of the metric system on the grounds that it is over 100 years old.

Finally, I have analyzed the costs presented by Mr. Thexton in his testimony and in my judgment, he has seriously under-estimated the costs. First of all, Mr. Thexton's costs are based on recent Hawaii experience which developed an average duration of benefits of 11.3 weeks. Railroad Retirement sickness benefits as reported in the 1975 Statistical Supplement have a 15-week average benefit payout. Major insurance companies now charge between 2-1/2 and 3 times the six-week maternity rate for full maternity benefits, which converts to a 15-18 week range. The costs being estimated by Mr. Thexton are very sensitive to the duration of benefits. For example, if his costs had been based on 13 weeks of benefits instead of 11.3, his additional cost of $611 million would have increased to $751 million.

Secondly, Mr. Thexton estimated only the additional benefit payments that would be made to covered individuals. On the average, insurance company premiums for short-term disability plans approximate 123% of claim payments because of claim settlement costs, premium taxes and administrative expenses involved. If the $751 million figure were loaded 23% to get to the premiums that plan sponsors will have to pay, it would become $924 million.

Finally, the 1.3 billion estimate in 1973 for the General Electric case included roughly $800 million for insured sickness and accident, $400 million for uninsured sick leave benefits and $140 million for insured long-term disability plans. Mr. Thexton's estimate is for the insured sickness and accident portion only and so the $924 million figure would have to be ratioed up by 1340/800 to include the costs to employers under sick leave programs and long-term disability plans. This would develop a cost of about $1.55 billion. If one then adds his $1.1 billion for added costs under Hospital-Surgical-Medical plans, the end result would be $2.65 billion that U.S. employers would have to pick up in added cost; i.e., about $36 per year per worker. This is somewhat more significant than Mr. Gold's $1.50.

Sincerely yours,

Paul H. Jackson

Paul H. Jackson
Fellow, Society of Actuaries

PHJ:cd

ATTACHMENT B

Attachment

MAJOR INDUSTRIAL STATES REQUIRING COVERAGE OF PREGNANCY AS AN EMPLOYEE DISABILITY

CALIFORNIA -

Included in State FEP Guidelines and states disability law.
No Judicial ruling yet.

CONNECTICUT -

Contained in State FEP Guidelines.
State Commission assumes State law prevails over Gilbert, but no judicial ruling yet.

ILLINOIS -

Contained in State FEP Guidelines and in State Commission Rulings.
State Commission assumes State law prevails over Gilbert, but no judicial ruling yet.

MICHIGAN -

Contained in Civil Rights Department Guidelines and in the Civil Rights Department rulings.
Civil Rights Department intends to apply its guidelines notwithstanding Gilbert.

MISSOURI -

Contained in State FEP Guidelines and in State Commission Rulings.
State Commission intends to apply its guidelines notwithstanding Gilbert.

NEW JERSEY -

Contained in State FEP Guidelines and in State Commission rulings.
State Commission assumes State law prevails over Gilbert, but no judicial ruling yet.

NEW YORK -

Contained in State FEP Guidelines and in State Commission rulings.
By judicial ruling, State law prevails.

PENNSYLVANIA -

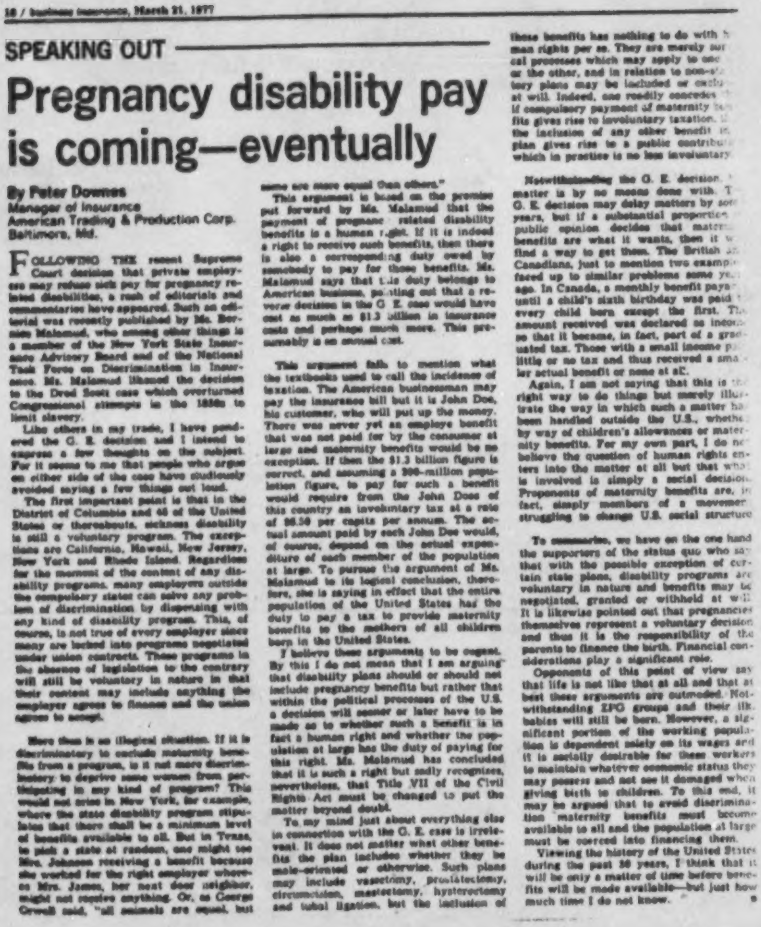
Contained in State FEP Guidelines.
State Commission assumes State law prevails over Gilbert, but no judicial ruling yet.

WISCONSIN -

Contained in State FEP Guidelines and in judicial rulings.
State statute prevails over Gilbert.

(Note: Major industrial states that do not require coverage of pregnancy as a disability include Ohio and Texas.)

ATTACHMENT C



18 / business insurance, March 21, 1977

SPEAKING OUT

Pregnancy disability pay is coming—eventually

By Peter Downes
Manager of Insurance
American Trading & Production Corp.
Baltimore, Md.

FOLLOWING THE recent Supreme Court decision that private employees may refuse sick pay for pregnancy related disabilities, a rush of editorials and commentaries have appeared. Such an editorial was recently published by Ms. Bernice Malamud, who among other things is a member of the New York State Insurance Advisory Board and of the National Task Force on Discrimination in Insurance. Ms. Malamud likened the decision to the Dred Scott case which overturned Congressional attempts in the 1850s to limit slavery.

Like others in my trade, I have pondered the G. E. decision and I intend to express a few thoughts on the subject. For it seems to me that people who argue on either side of the case have studiously avoided saying a few things out loud.

The first important point is that in the District of Columbia and 45 of the United States or thereabouts, sickness disability is still a voluntary program. The exceptions are California, Hawaii, New Jersey, New York and Rhode Island. Regardless for the moment of the content of any disability programs, many employers outside the compulsory states can solve any problem of discrimination by dispensing with any kind of disability program. This, of course, is not true of every employer since many are locked into programs negotiated under union contracts. These programs in the absence of legislation to the contrary will still be voluntary in nature in that their content may include anything the employer agrees to finance and the union agrees to accept.

Here then is an illogical situation. If it is discriminatory to exclude maternity benefits from a program, is it not more discriminatory to deprive some women from participating in any kind of program? This would not arise in New York, for example, where the state disability program stipulates that there shall be a minimum level of benefits available to all. But in Texas, to pick a state at random, one might see Mrs. Johnson receiving a benefit because she worked for the right employer whereas Mrs. James, her next door neighbor, might not receive anything. Or, as George Orwell said, "all animals are equal, but some are more equal than others."

This argument is based on the premise put forward by Ms. Malamud that the payment of pregnancy related disability benefits is a human right. If it is indeed a right to receive such benefits, then there is also a corresponding duty owed by somebody to pay for these benefits. Ms. Malamud says that this duty belongs to American business, pointing out that a reverse decision in the G. E. case would have cost as much as $1.3 billion in insurance costs and perhaps much more. This presumably is an annual cost.

This argument fails to mention what the textbooks used to call the incidence of taxation. The American businessman may pay the insurance bill but it is John Doe, his customer, who will put up the money. There was never yet an employe benefit that was not paid for by the consumer at large and maternity benefits would be no exception. If then the $1.3 billion figure is correct, and assuming a 200-million population figure, to pay for such a benefit would require from the John Does of this country an involuntary tax at a rate of $6.50 per capita per annum. The actual amount paid by each John Doe would, of course, depend on the actual expenditure of each member of the population at large. To pursue the argument of Ms. Malamud to its logical conclusion, therefore, she is saying in effect that the entire population of the United States has the duty to pay a tax to provide maternity benefits to the mothers of all children born in the United States.

I believe these arguments to be cogent. By this I do not mean that I am arguing that disability plans should or should not include pregnancy benefits but rather that within the political processes of the U.S. a decision will sooner or later have to be made as to whether such a benefit is in fact a human right and whether the population at large has the duty of paying for this right. Ms. Malamud has concluded that it is such a right but sadly recognizes, nevertheless, that Title VII of the Civil Rights Act must be changed to put the matter beyond doubt.

To my mind just about everything else in connection with the G. E. case is irrelevant. It does not matter what other benefits the plan includes whether they be male-oriented or otherwise. Such plans may include vasectomy, prostatectomy, circumcision, mastectomy, hysterectomy and tubal ligation, but the inclusion of these benefits has nothing to do with human rights per se. They are merely surgical processes which may apply to one or the other, and in relation to non-statutory plans may be included or excluded at will. Indeed, one readily concedes that if compulsory payment of maternity benefits gives rise to involuntary taxation, so the inclusion of any other benefit in a plan gives rise to a public contribution which in practice is no less involuntary.

Notwithstanding the G. E. decision, the matter is by no means done with. The G. E. decision may delay matters by some years, but if a substantial proportion of public opinion decides that maternity benefits are what it wants, then it will find a way to get them. The British and Canadians, just to mention two examples, faced up to similar problems some years ago. In Canada, a monthly benefit payable until a child's sixth birthday was paid for every child born except the first. The amount received was declared as income so that it became, in fact, part of a graduated tax. Those with a small income paid little or no tax and thus received a smaller actual benefit or none at all.

Again, I am not saying that this is the right way to do things but merely illustrate the way in which such a matter has been handled outside the U.S., whether by way of children's allowances or maternity benefits. For my own part, I do not believe the question of human rights enters into the matter at all but that what is involved is simply a social decision. Proponents of maternity benefits are, in fact, simply members of a movement struggling to change U.S. social structure.

To summarize, we have on the one hand the supporters of the status quo who say that with the possible exception of certain state plans, disability programs are voluntary in nature and benefits may be negotiated, granted or withheld at will. It is likewise pointed out that pregnancies themselves represent a voluntary decision and thus it is the responsibility of the parents to finance the birth. Financial considerations play a significant role.

Opponents of this point of view say that life is not like that at all and that at best these arguments are outmoded. Notwithstanding ZPG groups and their ilk, babies will still be born. However, a significant portion of the working population is dependent solely on its wages and it is socially desirable for these workers to maintain whatever economic status they may possess and not see it damaged when giving birth to children. To this end, it may be argued that to avoid discrimination maternity benefits must become available to all and the population at large must be coerced into financing them.

Viewing the history of the United States during the past 30 years, I think that it will be only a matter of time before benefits will be made available—but just how much time I do not know. ■

Mr. Hawkins. Mr. Jackson, I was going to ask the same question of you with respect to the cost estimates that you have. To what extent have you taken into consideration the States that may have plans already in operation which would not be substantially affected by the passage of the Federal law.

Mr. Jackson. The States that have plans in operation.

Mr. Hawkins. States in which the law operates already.

Mr. Jackson. Looking to our own clientele as a guide, there are very few companies that actually have changed their plans by reason of any State laws. We see very little evidence, for example, of nationwide employers changing plans in those States to provide this type of maternity income benefit.

The effect is still prospective; even though the law was passed, their impact is not all that clear.

Mr. Hawkins. It would seem to me that if the State of New York already includes this in law, the provision which we are attempting to make Federal, and the plans are operating already at some cost to the employers in that State, it would be, it seems to me, not fair to say that this bill itself is going to add to the total cost to the operation of those plans as, let us say, the State of Nevada which does not or may not have a plan.

I can understand that you could lump together all of the women in the work force and say, pregnancy is expected in a certain number of cases, and the actual cost per individual is such and such.

It would seem to me that you should also take into consideration the actual cost in the States that already have such plans in operation, and would not have to materially change.

It would seem to me also that this must also be considered the concluding testimony of Mr. Heylin for the Chamber of Commerce, which says that the bill poses serious threats to the financial position of disability plans.

It would seem to me also that you would have to somehow give us what has been the experience in those States which have gone ahead already to include plans, and whether or not this serious threat has developed in those States.

I am not aware of the experience one way or another, I am simply saying that it would be helpful to this committee to know whether these serious threats, which you imply, have already developed in the States where we already have some experience.

Mr. Heylin. Mr. Chairman we did refer to the experience of an employer in a State which did recently add this coverage for its employees, and it was about a 20 percent increase. To us it seems a little low.

We would be happy to check around and see if we can find some more employers who have initiated such plans, and what the cost increases have been. We still think that 20 percent is substantial.

Mr. Hawkins. We are talking about private plans under State law, and State-operated plans which include pregnancy disability coverage. I think that it would be of interest to the committee.

Mr. Calluli. In a number of these States, many of the decisions really have not been implemented as yet. Even in New York, where the Court of Appeals did hold directly contrary to the U.S. Supreme Court decision, and this case is under petition for rehearing, that decision has not been implemented.

So what we will get back to you is whatever information there is. I would doubt that there would be very significant change, since these laws are in the state of transition and implementation.

Even where these decisions have been made by human rights commissions, they have not been generally conceded by employers or insurers.

Mr. **Hawkins.** Even if that is the finding, it will make the record clear as to what the actual case is at the present time.

Mr. **Minck.** There have been several States that have had compulsory coverage enacted. That is a requirement by the State that employers provide disability income benefits for short-term disability for their employees, and one of them was New Jersey.

They did add a maternity benefit to their plan. It was required by the State. It was limited to 4 weeks before, and 4 weeks after pregnancy. The State plan was losing money at such a rapid rate that such a change was required in the law.

I think that the history of that shows that in fact there was a major threat to the solvency of the State plan in that particular circumstance.

Mr. **Hawkins.** Was that a State plan or a private plan?

Mr. **Minck.** You have your option in New Jersey. The State plan was being driven down. The funds dropped from, I think, $150 million to something like $60 million in a fairly short period of time.

Private plans which were competing were, of course, able to appropriately price. So they did not have the same difficulty. But there were substantial increases in the premium rates that they had to charge.

Mr. **Hawkins.** Thank you.

Mr. Sarasin?

Mr. **Sarasin.** Thank you, Mr. Chairman.

Gentlemen, Mr. Heylin, in your testimony you point out that 90 percent of the plans provide disability for sickness and accident for a 15 to 26 week period, and only 4 percent of the plans are limited to 6 weeks.

Am I reading this bill improperly, or does it say that if this bill goes through, those 90 percent of the plans that are in existence will have to provide disability benefits for pregnancy for 4 to 6 weeks?

Mr. **Heylin.** That is correct. Whatever the length of the disability coverage, they would have to provide pregnancy leave for that period.

Mr. **Sarasin.** It would be improper to limit it to 6 weeks?

Mr. **Heylin.** Under the language of H.R. 5055, section 2, I would think so, yes.

Mr. **Sarasin.** I think that this would provide a tremendous burden on the plans. If most of the negotiated plans provided for 6 weeks then it would be appropriate.

What is the ultimate result other than watching these plans bring down their disability period to find themselves more in line with the pregnancy benefits, which would be to the detriment of the men and the women.

Mr. **Heylin.** One problem is section II of the bill, and I have not had a chance to look carefully at it. I don't think that the employer would be allowed to reduce the other benefits to 6 weeks. I think that you would have to raise the pregnancy coverage to the same level as the other disability benefits. So, I don't think that there would be any cost restraints on that.

Mr. **Sarasin**. That is the way that I read section II as well. That is another part that bothers me.

Mr. **Jackson**. I think that one of the problems here is that most of the plans that are in existence, that provide benefits for sickness and accident are aimed at a form of disability where there is an immediate loss of income, and there is no advance planning.

The average pay-out on one of these sickness and accident plans is only for a 2-week period. These cover mainly the short-term problems. The plans have controls that are aimed at abuse in that area.

Simply taking normal maternity cases, and calling them sickness or accident disability, and forcing them under those plans, will create problems. The controls that operate to eliminate abuses under sickness and accident plans such as collecting too long, or people putting a claim in too early, will not work in the area of maternity.

I think the experience of the employers that have tried it is that something special in the way of controls is required, some new controls are necessary. Even in the case that Mr. Heylin cited of a company which allowed 13 weeks absence for pregnancy, controls were instituted and the absence was reduced to 7 weeks.

I have not seen section II of the bill either, but it sounds to me very much as though the institution of special controls would not be permitted. And yet nobody provides these kinds of maternity benefits anywhere else in the world without special limits before and after delivery that are shorter than the sickness limits.

Section II appears to say that such controls would be illegal. But they may be necessary for the operation of a sound plan in this area.

Mr. **Sarasin**. I think that you make a very good point in attempting to take the situation of maternity benefits and apply it to the sickness and accident policy. They could not be worked in under the same condition.

If this legislation were enacted, what would prevent the pregnant woman from being hired, giving birth, and then quitting her job?

Mr. **Jackson**. They do that now, and there is nothing that could prevent it. If mothers want to stay home and raise their children, that is another right that they have. Obviously, this should not be prevented.

One of the controls that exists on the short-term sickness, if people abuse the sickness coverage, this shows up in their absence record and it affects their career. They end up getting lower raises. They may end up getting fired, if their absence record is too poor.

That type of control, the threat that an individual will not get a pay increase, does not exist for that portion of the mothers who have a job and leave when they have a baby, with no intention of returning.

So this one area that helps to control sickness benefits, what the employer can do in supervisory actions on the return to work, just does not exist in that type of situation.

Mr. **Sarasin**. I think that Mr. Heylin's testimony points out, if the studies are correct, 40 to 50 percent of the females taking pregnancy leave do not return to work after their babies are born.

Whereas almost 100 percent of the workers taking disability leave do.

We are talking about two different situations. They are both covered by insurance, and we are looking for programs that treat them both alike when, in fact, they are not alike.

Mr. Jackson. We are not talking about a disability that can be checked by a physician to see if the individual is still disabled, and if not she should go back to work.

Mr. Sarasin. Aren't we then saying that because of the provisions of Section II, which prevent you from changing your plan, that the maternity benefits mandated by this law would be 13 to 26 weeks, regardless of the condition of the mother, that she could stay off for whatever length of time others would have under the particular policy, and then come back to work, and not be encouraged to come back earlier?

Mr. Heylin. That is certainly possible.

Mr. Jackson. There is a good deal more control in this area of the individuals with typical sickness and accident cases. Somebody is well one day, and then comes down with a fever, breaks a leg or something, and the next day they are sick. They may be in the hospital. They may have a period of recuperation where there is a question of a matter of a few days as to when they will recover. But it is really very limited in that area.

In the normal pregnancy area, there is a greater transition that stretches out over the full 9-month period, where obviously at the end of the period, the person is disabled, and at the beginning they are not, and almost at any point in between they could claim that disability has commenced.

The one thing that can be said about insurance coverage is that it has been demonstrated pretty clearly over the years, that the existence of insurance coverage affects these absences. When people collect benefits for being absent, instead of losing full pay for a period of time which encourages them to come back to work as fast as they can, they receive benefits, so that pressure is lessened. It does have an effect on claim rates.

In the disability area, after all, you would think that the state of disability was a medical state. Yet, you look at situations, like the auto industry, with the heavy layoffs of 1957 and 1958. I remember that the rate of disability doubled. This is because individuals who do not have money look around for places where they can get some. They file claims, and it is impossible to control all of these.

The experience of this coverage is that it is not related to a pure physical condition. It is very, very difficult to control. With the maternity benefits, the controls would have to be especially designed for them in order for the plan to work properly.

Mr. Sarasin. Is there anyone on the panel familiar with the State plans that have been discussed? Can you tell us how they handle those plans?

Mr. Minck. The pattern is a special maternity benefit. Again, other alternatives have been considered. The point that Mr. Jackson made is, I think, a very important one in costing. I don't think it can be overemphasized. If you look at the experience in a State before a State plan comes in, you will find the duration of claims increased markedly after the plan has been in existence for awhile.

The point being that there is not the economic pressure to return to work that there was before. In many instances, disability is something that an employee could go out of the way with on a given date.

I think that analysis of experience by the consulting actuaries for several of the States involved show that there were differences of up to 3 weeks in average claim duration for maternity once the plan had come in, as contrasted with what was being experienced in the State before.

Mr. SARASIN. The State plans that you are familiar with mandate the maternity benefits, but they treat that as something separate and apart from ordinary sickness and disability.

Mr. MINCK. Yes, sir; the benefit is limited in duration, and is provided on somewhat different terms.

Mr. SARASIN. There does not have to be comparability between maternity benefits that are provided, and whatever other benefits are provided by the employer as would be required in this legislation?

Mr. MINCK. That, I think, leads to another point.

Earlier there was a question, I think, of whether an employer could provide benefits that treated both men and women the same with regard to pregnancy. I think that an employer can, in the field of medical cost, provide no benefits for either female employees who become pregnant nor for the wives of the male employees who become pregnant.

That, I think, would be prohibited by this bill because it talks not about treating the employees equally, but rather about pregnancy having to be covered just as any other sickness or accident.

Again, it seems to me, it is addressing a condition rather than equal treatment of male and female employees.

Mr. SARASIN. I am a little bit confused. Maybe I ought to ask you again.

Mr. MINCK. Currently, if you have a plan that pays for medical bills and hospital care, pregnancy may be excluded from such a plan, whether the pregnant person is a female employee or the wife of a male employee, where you are covering dependents under the plan.

Mr. SARASIN. Or they may be included.

Mr. MINCK. It is done both ways. They may be included on a different basis than you normally reimburse. It could be on a flat basis of $500 for maternity benefits.

Mr. SARASIN. Wouldn't it be more typical if the wife of a male employee and the female employee would be entitled to the same medical benefits, but not a disability payment.

Mr. MINCK. You do not ordinarily provide disability payments to dependents, just to employees. But that is perfectly equal treatment, I think, to both classes of employees, whether they are male or female. The same amount of economic loss is being repaid. I think that this would be prohibited by this bill, because the bill says that you have to treat pregnancy the same as any other disability.

Mr. SARASIN. I am not sure that I follow that point.

Why do you say that this would be prohibited?

Mr. MINCK. The bill is drafted not in terms that you treat your male employees the same as your female employees, but in terms of saying that you make the same treatment for pregnancy that you do for any other disability.

So that would mean whether the pregnancy involves the wife of a male employee, or a female employee, you would have to provide the same medical benefits on the same terms that you do for pneumonia.

Mr. SARASIN. The same terms as you do for pneumonia.

Mr. MINCK. You could not have a $500 flat benefit. You would have to provide—if it is a major medical coverage—you would have to provide for, after the deductible is made, 80 percent of the total costs involved.

If you have a hospital surgical, it would have to be the number of days in the hospital, whatever your daily rate benefit is, and so on.

Mr. SARASIN. Somehow it is not getting through to me. Maybe I will get a chance to discuss it further with you. I am not sure that I understand the point you are making.

Thank you, Mr. Chairman.

Mr. HAWKINS. Mr. Weiss.

Mr. WEISS. No questions.

Mr. HAWKINS. Thank you again for your presentation. You have been most helpful to the committee. We will appreciate receiving the additional information which has been requested.

The next panel is composed of Mr. Ethel Bent Walsh, Vice Chairman, Equal Opportunity Commission, who is accompanied by Ms. Issie Jenkins, Deputy General Counsel, EEOC; Mr. Drew Days, Assistant Attorney General for Civil Rights, Department of Justice; and Alexis Herman, Director of the Women's Bureau, Employment Standards Administration, Department of Labor.

The first witness is Vice Chairman Walsh of the Equal Opportuniey Commission.

Mrs. Walsh, you have been before this committee before, and we are pleased to welcome you back. We look forward to your presentation. We do have a written statement from you, and we will ask you to summarize it, which we know you are very capable of doing. We will then hear from the other witnesses in the order in which they were called.

You may proceed, Commissioner.

STATEMENT OF ETHEL BENT WALSH, VICE CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mrs. WALSH. Mr. Chairman, members of the subcommittee, as a woman, as a working mother and as Acting Chairman of the Equal Employment Opportunity Commission, I want to thank you for this opportunity to appear today on behalf of the Equal Employment Opportunity Commission to urge prompt passage of H.R. 5055.

This bill amends title VII of the Civil Rights Act to define sex discrimination to include discrimination on the basis of pregnancy or childbirth. This legislation has, of course, become necessary only because of the Supreme Court's decision last term in *General Electric Co.* v. *Gilbert*, that title VII does not prohibit any employer from refusing to pay temporary disability benefits to employees absent from work because of pregnancy-related disabilities, even though all absences caused by any other disability are covered.

The *Gilbert* decision has left a gaping hole in the protection afforded by title VII to women—discrimination on the basis of pregnancy continues to be a significant barrier to the equal participation of women in the labor market.

The Equal Employment Opportunity Commission recognized this problem in the Commission's first annual report, where we said that:

> To carry out the Congressional policy of providing truly equal employment opportunities * * * for women, policies would have to be devised which afforded female employees reasonable job protection during periods of pregnancy.

Over the next few years, the thousands of charges filed by women confirmed the wide range of discriminatory pregnancy-related practices to which women were subjected. In hiring, women were subjected to inquiries concerning their family planning intentions. Men were not. Too often, women were totally excluded from employment because they might become or were pregnant. Even if hired, a double standard prevailed—most particularly in the area fringe benefits. Often, women were fired as soon as they became pregnant and were not rehired, or, if rehired, not given credit for their past years of work.

As a result, the Commission began to issue decisions addressing the specific problems one by one. As early as mid-1969, the Commission decided that a company's termination of a female employee because she was pregnant and its refusal to rehire her were unlawful.

The Commission found, 6 months later, that a policy under which maternity leave is only afforded to female employees, depending upon the individual circumstances, did not comport with Commission policy. The Commission expressed the opinion that:

> To provide substantial equality of employment opportunity * * * there must be special recognition for absences due to pregnancy * * * for this reason * * * a leave of absence should be granted for pregnancy whether or not it is granted for illness.

In 1970, the Commission found that other variations of maternity leave policies constituted sex discrimination, and for the first time considered differential medical maternity insurance coverage for female employees and wives of male employees. The Commission found that such a difference in the availability of insurance coverage to male and female employees constituted unlawful discrimination because of sex.

This process culminated in the Commission's issuance in 1972 of a comprehensive guideline concerning sex discrimination and employment policies relating to pregnancy and childbirth. This guideline explicitly states that exclusion from initial hiring, complete or partial denial of fringe benefits, and discharge because of pregnancy violated title VII.

There can be no question that the wide range of employment policies directed at pregnant women—or at all women because they might become pregnant—constitutes one of the most signifiant hindrances to women's equal participation in the labor market. The effect of discriminatory pregnancy policies impacts not only on the millions of working women themselves, but also on additional millions of men and children who depend on the working woman's income.

I would like to point out a few of the more general indices of the precarious financial position of women in the labor force, a position made even more precarious by any policies endangering their income—indeed, even their continued employment—when they become pregnant:

Nearly two-thirds of all women who work do so because of financial need. Either way they are the sole wage earner completely responsible for their own or their families' support, or their husband earn less than $7,000 a year.

In nearly half, at 47 percent, of all families with both spouses present, both work. Women in these dual income families contribute approximately one-quarter, or 27 percent, to the family income.

Thirteen percent of all families are headed by women alone. Half of these 7½ million single, divorced, separated, or widowed women are in the labor force and are absolutely dependent on their own income for their family's survival and well-being.

And women are entering the work force in even greater numbers. Again, very briefly: In 1974, 45 percent of all women over the age of 16 were in the labor force; it is among married women that the greatest increase has taken place. While in 1950 about one-quarter of married women worked, that number had increased to 44 percent by 1975. And more than a third, or 37 percent, of women with preschool-aged children now work, an increase from 12 percent in 1950.

These figures only begin to describe the reality that millions of women work because of compelling economic need.

Policies which disadvantage women when they become pregnant—or even because they might become pregnant—endanger the limited financial security they now have. The loss of several weeks of disability pay to a woman and her family may be the loss of the only money coming through the door. Even more frightening, a woman who becomes pregnant may face the permanent loss of her job. To many working women, these policies may mean having to make a choice between having a child or keeping a job.

The Supreme Court does not believe that the traditional concepts of "discrimination on the basis of sex" include refusing to pay a woman disability benefits when she misses work because of childbirth.

As a result of the December 7 decision, *General Electric* v. *Gilbert*, our Commission has been forced to take steps to dismiss pregnancy benefits allegations in Commission lawsuits.

Among those lawsuits are 26 which raise maternity benefits claims only. We are forced to seek dismissal of all 26. There were 63 units raising multiple issues, including maternity benefits. In 59 of these suits, we have taken steps to dismiss the benefits counts only, moving forward with the other issues. In the remaining four suits, we plan to dismiss all counts. In summary, there are 89 suits in which we are compelled to seek dismissal of all or some of the allegations.

In addition, 17 of our pattern-or-practice charges—or consolidated individual charges—raise maternity benefits violations. These are all multiple-issue charges, and we will remove the benefits claims only.

As a woman, as a working mother, and as acting chairman of the Equal Employment Commission, I consider this unconscionable.

It is abundantly clear that the passage of this bill is essential to demonstrate that Congress intends title VII's protection againt sex discrimination to include protection against discrimination because of pregnancy. The Equal Employment Opportunity Commission unequivocally endorses and urges prompt passage of H.R. 5055.

Thank you, Mr. Chairman.

Mr. HAWKINS. Thank you, Commissioner Walsh.

The next witness is Ms. Issie Jenkins, deputy general counsel, Equal Employment Opportunity Commission.

Ms. JENKINS. I do not have a statement. I am accompaning Mrs. Walsh.

Mr. HAWKINS. We will then call on Drew Days, Assistant Attorney General for Civil Rights, Department of Justice.

[Prepared statement of Mr. Days follows:]

Department of Justice

STATEMENT

BY

DREW S. DAYS, III
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON EQUAL OPPORTUNITIES
HOUSE OF REPRESENTATIVES

CONCERNING

THE PROPOSED AMENDMENT OF TITLE VII
OF THE CIVIL RIGHTS ACT OF 1964
TO PROHIBIT SEX DISCRIMINATION ON THE
BASIS OF PREGNANCY

ON

APRIL 6, 1977

I am pleased to appear before the Subcommittee this morning to testify on H.R. 5055, which would amend Title VII of the Civil Rights Act of 1964 to explicitly prohibit sex discrimination in employment on the basis of pregnancy, childbirth and related medical conditions. Accompanying me here this morning are David Rose, Chief of our Employment Section in the Civil Rights Division, and Cynthia Attwood, an attorney in our Appellate Section, who have assisted in our study of the issues surrounding the proposed amendment.

The need for a bill such as H.R. 5055 became apparent in December of last year when the Supreme Court decided General Electric Co. v. Gilbert. In that case, the Court decided that Title VII does not prohibit an employer from denying pregnant women disability benefits, although that employer provides benefits for all other disabilities including those which can be suffered only by men unless it can be shown that such a denial is a pretext for discrimination against women or has a discriminatory effect.

I would like briefly to describe the Gilbert case and the interest of the United States in it, and then to discuss the desirability of legislation to clarify what we believe was the original intent of Congress.

The Gilbert suit was brought by female employees of General Electric Company who had been denied disability benefits for pregnancy, and pregnancy related medical conditions under a disability benefit plan which covered other forms of disability. Coverage under the plan was included, among other things, for elective surgery, for disabilities resulting from an employee's commission, or attempt to commit, an assault, battery or felony. The plan also covered disabilities resulting from voluntary activities such as sports injuries or venereal disease. In short the plan was to provide a temporary source of income to employees unable to work due to physical disability, but excluded pregnancy, or pregnancy related medical problems, or even a disability not related to pregnancy, but which occurred while a female employee was on leave from her job due to pregnancy.

The district court ruled that the exclusion of pregnancy - related disabilities violated Title VII's prohibition against sex discrimination, and the court of appeals affirmed that decision. The court of appeals in the Gilbert case was not alone, as the other courts of appeals which had considered the issue had ruled that such exclusions could amount to sex discrimination in violation of Title VII.[1] In addition, Guidelines promulgated by the Equal Employment Opportunity Commission concluded that such actions constituted sex discrimination.

When the Supreme Court decided to rule on the Gilbert case during the past administration, the Solicitor General, together with the General Counsel of the Equal Employment Opportunity Commission, filed a brief as a friend of the court, in which the United States argued that a disability benefits plan such as the one by General Electric discriminated against women on account of their sex. The brief noted that the "net result of the pregnancy exclusion," was "to subject only women to a substantial risk of total loss of income because of temporary medical disability." "Insulating men from that risk while leaving women subject to it is necessarily discriminatory."

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[1] Satty v. Nashville Gas Co., 11 FEB cases 1 (C.A. 6); Huchison v. Lake Oswego School District, 519 F.2d 961 (C.A. 9); Wetzel v. Liberty Mutual Insurance Company, 511 F.2d 199 (C.A. 3).

My immediate predecessor as Assistant Attorney General for Civil Rights, J. Stanley Pottinger, participated in oral argument before the Supreme Court in Gilbert in order to emphasize the view of the agencies responsible for enforcing Title VII, that discrimination on account of pregnancy constituted sex discrimination in violation of Title VII. I have attached a copy of the Brief for the United States and the EEOC to my statement.

The Supreme Court, however, disagreed. The court ruled that an exclusion of any pregnancy disability from a disability benefits plan providing coverage for any disability to an employee is not sex discrimination under Title VII of the Civil Rights Act of 1964, in the absence of a showing that the exclusion is a pretext for discriminating against women. Three justices dissented from the Court's ruling. Mr. Justice Stevens stated that:

> ...the rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.

We believe that the views expressed by the dissenters, the EEOC Guidelines, the courts of appeals which had reached the issue, and the Department of Justice were consistent with the purpose of Title VII: to remove artificial and discriminatory barriers to equal participation in the work force. Therefore, this Administration wishes to endorse, and lend its support to efforts to amend Title VII to carry out what we believe to have been Congress' intent when it included the prohibition against sex discrimination in Title VII.

I believe that H.R. 5055 is a simple, effective vehicle for achieving that end, and I would like to make a few short points about this legislation. The prohibition against discrimination contained in H.R. 5055 would apply to all aspects of the employment process - to hiring, reinstatement rights, seniority, and other conditions of employment covered by Title VII as well as to disability benefits. ¶ The basic purpose of ~~H.R. 5055~~ bill, therefore, is to ensure that pregnancy related disabilities are treated the same as all other temporary disabilities. H.R. 5055 achieves this goal by amending the definition section of Title VII, so that it is clear that for purposes of Title VII, discrimination on account of pregnancy is sex discrimination. Amendment of the definition portion of Title VII appears more appropriate than an alternative, which would be to add a new, separate prohibition to the Act. What I believe we are attempting to accomplish through this legislation is to clarify what many of us thought was the original intent of the Act.

H.R. 5055 makes it clear that an employer could not attempt to use any interpretation of the Equal Pay Act which might be inconsistent with Title VII's amended definition of sex discrimination as a defense to a charge that he discriminated on account of pregnancy. The proposed legislation does not purport to elevate pregnancy above other employment disabilities, and require employers to assume the costs of pregnancy when they would not do so with regard to other physical disabilities. Nothing in H.R. 5055, for example, requires an employer to have a disability plan for employees. Nor does H.R. 5055 regulate an employer's obligations with regard to employees' absences due to child care obligations; such absences are not due to medically determinable conditions related to pregnancy. What is required is that pregnant employees who are able to work be treated like others who are similarly able to work; and that pregnancy related disabilities be treated the same as the disabilities of other employees.

We do have one suggestion regarding the language of H.R. 5055. Title VII refers in various places, not simply to "because of sex" and "on the basis of sex," but also to "upon the basis of sex" and "on the basis of such individual's sex." In order to ensure that this new definition of sex discrimination applies to all provisions of the Act, this subcommittee might consider including the latter two phrases.

We do not anticipate that legislation such as H.R. 5055 will result in any long term increase in the federal court case load. To the extent that, after Gilbert, there are other questions remaining regarding discrimination on account of pregnancy, this legislation will aid the courts by clarifying the meaning of Title VII in this area.

Although there might be an initial spate of suits to enforce this amendment, we believe that because of the nature of the rights protected by it most employers will come into compliance with the amendment in a relatively short period of time, thus ~~vitiating~~ the need for extensive litigation.¶ Moreover, as the bulk of the law developed prior to the Gilbert decision treated discrimination based on pregnancy as sex discrimination, many employers were already complying with the proposed legislation prior to Gilbert. The net result, we believe will be neither a substantial increase or decrease in the federal court caseload.

We do not have any hard and fast notions of the cost of this legislation to employers in terms of added disability benefit protection and so forth. We will leave that calculation to persons better able to provide such information. However, we anticipate that the nationwide cost will not be nearly as substantial as some opponents of this type of legislation have speculated. In any event the cost to the nation for this type of protection of pregnant workers is offset at the present by the artificial shrinkage of the work force and the cost women workers must absorb as a result of discrimination against pregnant workers. We believe that cost, therefore, should not be a deterring factor in the passage of this legislation.

H.R. 5055 is attractive in its simplicity. We believe that it would accomplish an exceedingly important end. Discrimination based on pregnancy and related medical conditions has a dramatic negative impact on the employment opportunities and expectations of women in the national workforce. The economic impact on women and their families when pregnancy temporarily disables a woman employee is as great as the impact of other temporary disabilities; and it comes just as the employee has another mouth to feed. Disability insurance plans and sick leave plans are designed to cushion the economic consequences of temporary disabilities. It is unfair to exclude a major disability suffered only by one sex, when other disabilities are covered.

The record of discrimination against women in employment is well known to this subcommittee and has not been fully eradicated. In 1956, fully employed women's earnings were 63% of men's earnings. In 1970, they had fallen to 59%.2/

2/ U.S. Department of Labor, 1975 Handbook on Women Workers, Bull. No. 297, at 4 (1975).

Women are likely to have shorter job tenure than men,[3] and are more likely to be employed part-time or part-year.[4] Although many factors contribute to these statistics, one circumstance that is likely to make it difficult for women to retain regular employment is discrimination based on pregnancy, including the unavailability of sick leave and health care benefits when they are temporarily disabled by pregnancy. Uncovered medical expenses, loss of income and employment opportunities, and limitations on reinstatement rights all operate to make women, whether pregnant, potentially pregnant, or formerly pregnant, second-class citizens in the employment sphere.]

The fundamental purpose of Title VII, as it prohibits discrimination on account of sex, is to make men and women equals in the market place. To the extent that women employees are required to absorb economic costs and disadvantages because of pregnancy - this goal cannot be met.

For these reasons I hope that Congress will act upon this legislation with dispatch.

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[3] *Id*. at 61.

[4] *Id*. at 51.

STATEMENT OF DREW DAYS, ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS, DEPARTMENT OF JUSTICE

Mr. DAYS. I am pleased to appear before the subcommittee this morning to testify on H.R. 5055, which would amend Title VII of the Civil Rights Act of 1964 to explicitly prohibit sex discrimination in employment on the basis of pregnancy, childbirth, and related medical conditions.

Accompanying me here this morning are David Rose, chief of our employment section in the Civil Rights Division; and Cynthia Attwood, an attorney in our appellate section, who have assisted in our study of the issues surrounding the proposed amendment.

My statement is somewhat detailed, and I will omit some of those portions to get at what I am sure the committee would like to hear with respect to our position.

Previous speakers have already identified the fact that the case of *General Electric* v. *Gilbert* is the decision of the Supreme Court that has brought, perhaps, the committee and other people here today to evaluate the need for an amendment to title VII.

I would like to address myself to some of the impacts of that decision, and the need for this legislation.

When the Supreme Court decided to rule on the *Gilbert* case during the past administration, the Solicitor General, together with the general counsel of the Equal Employment Opportunity Commission, filed a brief as a friend of the court, in which the United States argued that a disability benefits plan such as the one by General Electric discriminated against women on account of their sex.

The brief noted that the net result of the pregnancy exclusion was:

> To subject only women to a substantial risk of total loss of income because of temporary medical disability. Insulating men from that risk while leaving women subject to it is necessarily discriminatory.

My immediate predecessor as Assistant Attorney General for Civil Rights, J. Stanley Pottinger, participated in oral argument before the Supreme Court in *Gilbert* in order to emphasize the view of the agencies responsible for enforcing title VII, that discrimination on account of pregnancy constituted sex discrimination in violation of title VII.

I have attached a copy of the brief for the United States and the EEOC to my statement.

[Brief referred to follows:]

In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1245, 74-1589 and 74-1590

LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER
v.
SANDRA WETZEL, ET AL.

GENERAL ELECTRIC COMPANY, PETITIONER
v.
MARTHA V. GILBERT, ET AL.

MARTHA V. GILBERT, ET AL., PETITIONER
v.
GENERAL ELECTRIC COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FOURTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether a private employer's exclusion of pregnancy and pregnancy-related disabilities from an otherwise comprehensive employee disability income protection plan constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*

INTEREST OF THE UNITED STATES

The responsibility for federal enforcement of Title VII has been given by Congress to the Department of Justice, the Equal Employment Opportunity Commission, and the Civil Service Commission. Under 42 U.S.C. (Supp. IV) 2000e–5(f)(1), the Equal Employment Opportunity Commission may bring a civil action against a private employer if, following the filing of an individual's charge with the Commission, conciliation efforts fail. When the employer is a government, governmental agency, or political subdivision, excluding the federal government, the Commission may refer the case to the Attorney General for suit. When federal employment practices are at issue, the Civil Service Commission, in addition to exerting oversight responsibility to insure nondiscrimination in federal employment, serves as the reviewing administrative authority for Title VII charges filed by individual employees against federal agencies. 42 U.S.C. (Supp. IV) 2000e–16.

Both the Equal Employment Opportunity Commission and the Civil Service Commission have issued guidelines to effectuate the provisions of Title VII. Two of the EEOC guidelines, 29 C.F.R. 1604.9 and 1604.10, are directly applicable here and were relied upon by both courts of appeals in support of their decisions in these cases[1] (*Wetzel* v. *Liberty Mutual,* 511 F.2d 199, 204, n. 5 (C.A. 3); *Gilbert* v. *General Electric Co.,* 10 FEP Cases 1201 (C.A. 4), opinion printed in the Supplemental Brief of all Parties to the Joint Petition for a Writ of Certiorari,[2] at 3a, n. 7).

Moreover, pursuant to Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681, the Department of Health, Education, and Welfare promulgated regulations concerning pregnancy disability which were signed by the President and submitted to the Congress. Although these regulations are not applicable here since petitioners are not within the ambit of the education amendments, the validity of this administrative interpretation will be affected by the Court's decision in these cases.

Also, since resolution of these cases will affect the responsibilities not only of private employers, but of governmental employers as well, the Court's decision will affect the Title VII enforcement responsibility of several federal agencies.

STATEMENT

The petitioner employers in the cases before this Court are private employers which maintain income disability protection plans designed to help employees

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[1] Although federal maternity leave policies are not directly involved in either suit, they are consistent with the policies reflected in these EEOC guidelines. Pregnancy disability leave is treated under the same sick leave provisions as are all other disabilities. See *Federal Personnel Manual*, Chapter 630, Subchapter 13, § 13-2 (April 30, 1975). See also 5 C.F.R. 630.401(b).

[2] Hereinafter cited "Jt. Supp. Pet."

through periods of disability. The plans, to which employees must subscribe, accomplish this by providing the disabled employee with a percentage of his or her weekly income during the period of disability. Both plans specifically exclude pregnancy disability from coverage.

1. *Liberty Mutual Insurance Co.* v. *Wetzel*

This suit was filed as a class action, alleging a broad range of sexually discriminatory treatment,[3] including the exclusion of pregnancy from the income disability plan. The plan states that "[w]hen disability from illness or accident keeps you away from work, your Income Protection Plan is designed to continue a portion of your usual earnings" (Br. of Lib. Mut. at A2).

In addition to excluding disability from pregnancy or any cause related to pregnancy, the Liberty Mutual plan excludes disability caused by acts of war or undeclared war, attempted suicide or intentionally self-inflicted injury, or any disability not requiring the attendance of a physician licensed to prescribe and administer drugs and to perform all surgical procedures (App. 99).[4]

The employee covered by the Liberty Mutual plan pays 33 cents per one hundred dollars of salary (App. 99). According to the petitioner's booklet, this is approximately one-third the cost of the plan, and the balance is paid for by the petitioner (App. 99).

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[3] Other issues initially in this suit involved pay differentials, discriminatory hiring practices, discriminatory job classifications, and maternity leave practices. These issues were resolved below adversely to the employer and are not before this Court. See 508 F.2d 239 (C.A. 3), certiorari denied, 421 U.S. 1011, and 511 F.2d 199 (C.A. 3), certiorari granted on another issue, 421 U.S. 987.

[4] Citations to the *Wetzel* appendix appear as "App."

On plaintiffs' motion for summary judgment, the district court held that the employer's practice violated Section 703(a) of Title VII and granted plaintiffs' motion for partial summary judgment (372 F. Supp. 1146 (W.D. Pa.)). The Third Circuit affirmed (511 F.2d 199). The court of appeals rejected petitioner's reliance on this Court's opinion in *Geduldig* v. *Aiello*, 417 U.S. 484, holding that the constitutional interpretation of *Geduldig* was not directly applicable to the statutory interpretation of Title VII. The court noted, and deferred to, the applicable EEOC guideline (29 C.F.R. 1604.10(b)) which indicates that benefits are to be applied to pregnancy disability on the same basis as benefits are applied to other disabilities. The court of appeals rejected petitioner's justifications for excluding pregnancy from the disabilities covered by its plan, and concluded that the practice violated Title VII because "[t]he company's policy is neutral on its face but treats a protected class of persons in a disparate manner. This is precisely what Title VII intends to strike down." 511 F.2d at 206–207.[5]

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[5] Liberty Mutual did not offer to introduce any evidence in support of its contention that the costs of including pregnancy-related disabilities preclude its expanding the coverage of its plan (see 511 F.2d at 206). Instead, it took the position that the cost of including pregnancy-related disabilities could not be reliably estimated (App. 165, 194).

2. *General Electric Co.* v. *Gilbert*

This suit was also filed as a class action, limited to the issue of exclusion of pregnancy from GE's disability income protection plan. The plan, which includes sickness and accident coverage, as well as life and medical insurance components, states that "[t]his plan is designed to help you and your dependents meet the threats to security that are brought about by loss of wages through death or disability and the medical expenses which occur when you or one of your dependents have a sickness or accident" (III App. 1062).[6] The plan excludes only disability from pregnancy (or suffered while absent from work due to pregnancy, see II App. 423) or from complications in connection with pregnancy and childbirth (III App. 1066).[7] The GE Sickness and Accident Insurance Plan, at one time financed partially by employee contributions, is at present financed totally by the employer (III App. 1067), which is a self-insurer (I App. 175, 241).

Following a trial, the district court held that the exclusion of pregnancy-related disabilities violates Title VII's prohibition against sex discrimination. The court of appeals affirmed, finding that the exclusion is sex-linked and a violation of Title VII, and that pregnancy-related disabilities do not differ significantly from other disabilities covered by the plan. As in *Wetzel,* the court rejected the "voluntariness" distinction offered by the employer, finding that the plan covers other disabilities voluntarily incurred (Jt. Supp. Pet. 6a–7a). The court, as did the Third Circuit in *Wetzel,* rejected petitioner's reliance on *Geduldig, supra,* noting that Title VII's standards were not the same as those applied by this Court in *Geduldig.*

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[6] Citations to the *Gilbert* Appendix appear as "(volume no.) App."

[7] Coverage is included, *inter alia*, for elective surgery, for disabilities resulting from self-inflicted injuries (including attempted suicide), and for disabilities resulting from an employee's commission, or attempt to commit, an assault, battery or felony (II App. 608, 614–615).

Unlike the petitioner in *Wetzel,* GE had offered evidence in the district court on the issue of increased cost of inclusion of pregnancy benefits for the purpose of disproving intent to discriminate. The district court viewed the cost evidence within the context of a business necessity defense, and found that the standard imposed by that defense was not proved by the cost evidence. The court of appeals held the cost evidence irrelevant, noting that it was not offered as a business necessity defense (and, indeed, that such a defense was specifically disclaimed), but to disprove the possibility of proof of invidious intent left open by *Geduldig.* Because *Geduldig* was inapplicable, the court of appeals ruled, it had no occasion to consider the cost evidence (Jt. Supp. Pet. 10a–11a and n. 23).

SUMMARY OF ARGUMENT

By including sex as one of the prohibited bases of discrimination in Title VII of the Civil Rights Act of 1964, Congress enacted a broad prohibition against employment practices which differentiate between employees on a sexual basis to the detriment of either sex. See *Fitzpatrick* v. *Bitzer,* 10 FEP Cases 956, (C.A. 2), certiorari granted on other issues, December 15, 1975 (No. 75-251). The disability insurance plans at issue here comprehensively cover all substantial risks of employee income loss due to disability except for pregnancy-related disabilities. Their net effect, therefore, is to subject only women employees to a substantial risk of total loss of income because of temporary medical disability. This is necessarily a discrimination on the basis of sex in *prima facie* violation of Title VII, regardless of the extent to which women as a statistical group benefit from the plans' coverage of other causes of disability. Whether or not the latter consideration might in other circumstances justify special treatment of pregnancy coverage within a disability plan, it cannot compensate for subjecting only women to the risk of disability without income protection by total exclusion of pregnancy-related disabilities from the present, otherwise comprehensive plans.

This Court's decision in *Geduldig* v. *Aiello,* 417 U.S. 484, is not to the contrary. As the six courts of appeals which have addressed the issue have unanimously stated, the Court's hold in *Geduldig* that the Fourteenth Amendment permits a state to proceed one step at a time in enacting a disability benefits program does not require or even suggest that Congress' comprehensive (rather than one-step-at-a-time) prohibition of all forms of sex discrimination in employment in Title VII should be interpreted to permit exclusion of pregnancy coverage from otherwise comprehensive employee disability insurance plans.

Nor did the courts below err in relying on the applicable guideline of the Equal Employment Opportunity Commission. There is no indication that the guideline is contrary to congressional intent, and this Court has explicitly stated that the fact the responsible agency has changed its position on an issue does not mean that its current interpretative regulation is not entitled to judicial deference.

Finally, petitioners' asserted justifications for the pregnancy exclusion do not constitute the showing of business necessity required to rebut a *prima facie* violation of Title VII. The justifications offered here are solely cost-related, and petitioners have not shown that the cost of a disability insurance program which accommodates pregnancy disability would in some manner be prohibitive. Regardless of whether some actuarial-based method of insuring the risk of pregnancy-related disability might be devised that would apportion the costs of the program fairly and still be consistent with Title VII, the complete exclusion presented in these cases is prohibited by Title VII.

ARGUMENT

I

TITLE VII FORBIDS THE COMPLETE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM THE BENEFITS AFFORDED BY AN EMPLOYER'S INCOME PROTECTION PLAN WHICH PROTECTS EMPLOYEES AGAINST OTHER, SIMILAR DISABILITIES

A. THE EXCLUSION OF PREGNANCY-RELATED DISABILITY FROM THE PLANS HERE AT ISSUE IS A *PRIMA FACIE* VIOLATION OF TITLE VII

In enacting Title VII of the Civil Rights Act of 1964, Congress established a broad prohibition of unequal treatment by employers of their employees on the basis of race, religion, national origin, or sex. This Court, on the several occasions when it has considered Title VII in the context of racial discrimination, has recognized that Congress' purpose in enacting Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800. See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429–430. Since Section 703(a) established a similar prohibition for discriminatory practices based on sex, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, it is clear that Title VII was intended as well to eliminate employment practices[8] which disparately treat men and women:

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

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[8] Petitioner GE argues that a benefit of employment is less "significant" than an employment opportunity and is afforded less protection by Title VII (see Br. of GE at 53–54.). The Act, however, specifically states (Section 703(a)) that it is an unlawful employment practice to "fail or refuse to hire * * *, or otherwise to discriminate * * * with respect to compensation, terms, conditions, or privileges of employment, because of * * * sex," indicating no difference between its prohibition of discrimination in hiring and in other areas of employment practices. See 29 C.F.R. 1604.9(b), the EEOC guideline which prohibits discrimination in the application of fringe benefits in similar terms, which is set forth at p. 33, *infra*. See also *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90 (C.A. 3); *Rogers* v. *Equal Employment Opportunity Commission*, 454 F.2d 234 (C.A. 5).

Sprogis v. *United Air Lines, Inc.*, 444 F.2d 1194, 1198 (C.A. 7), certiorari denied, 404 U.S. 991. Although present judicial standards for assessing challenges made under Title VII have, for the most part, arisen in cases considering practices found to affect employees detrimentally on a racial basis, those standards are equally applicable to sex-based claims, and provide proper guidance for deciding whether the practice violates Title VII. *Palmer* v. *General Mills, Inc.*, 513 F.2d 1040, 1042–1043 (C.A. 6); *Bowe* v. *Colgate, Palmolive Co.*, 489 F.2d 896, 900 (C.A. 7).

In *Griggs, supra,* this Court held that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (401 U.S. at 431), and emphasized that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (*id.* at 432). See also *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405. Accordingly, an employment practice may be found to be a *prima facie* violation of Title VII's prohibition against sexual discrimination either by proof that it is specifically directed only at one sex, *Weeks* v. *Southern Bell Tel. & Tel. Co.,* 408 F.2d 288 (C.A. 5), or by proof that the practice, however sexually neutral it appears to be, affects primarily members of one sex, *Danner* v. *Phillips Petroleum Co.,* 447 F.2d 159 (C.A. 5).

The disability insurance plans before this Court both specifically exclude pregnancy disability from their otherwise comprehensive coverage. Their underlying purpose is, of course, to protect the disabled employee against the twin hardships of loss of income due to inability to work and medical expenses. The disabled pregnant employee, however, is no less affected by the need for such protection than is any other disabled employee. And, in contrast to the other, quite unusual causes of disability not covered by the Liberty Mutual plan which affect both men and women (see p. 4, *supra*), "[p]regnancy is," as the court of appeals stated in *Gilbert*, "a condition unique to women" (Supp. Jt. Pet. 4a).

The net result of the pregnancy exclusion in these plans, therefore, is to subject only women to a substantial risk of total loss of income because of temporary medical disability.[9] Men (and, of course,

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[9] Both petitioners seek to distinguish pregnancy from the conditions covered by their respective plans to justify its exclusion (see Br. of Liberty Mutual at 16–19; Br. of GE at 62–66). Primary reliance is placed on the proposition that pregnancy is a voluntary condition, and not a sickness or a disease, and, therefore, may properly be excluded from an employee insurance program designed to provide benefits to employees unable to work due to sickness or disease-related disability.

Both courts of appeals rejected this alleged distinction (*Wetzel*, 511 F.2d at 206, *Gilbert*, Jt. Supp. Pet. at 6a–7a). Both plans cover disabilities which result from voluntary activities, such as sports injuries or venereal disease (which, like pregnancy, may be an unintended consequence of voluntary sexual activities). Similarly, both plans cover voluntarily incurred disabilities resulting from cosmetic or other elective surgery, rather than from sickness or disease. In addition, pregnancy may not always be voluntary, and the complications of pregnancy, which are a sickness not voluntarily assumed, are also excluded from the petitioners' plans (App. 99, III App. 1066). In short, the purpose of these plans is comprehensively to provide a temporary source of income to employees unable to work due to physical disability, and there women physically unable to become pregnant) are subject to no such risk under the General Electric plan and to only slight risk of that consequence (a risk also shared by all the women) under the Liberty Mutual plan.

The fact that the plans subject only some, rather than all, of the women employees to this substantial risk is not significant for Title VII purposes, since it is settled that the Act affords protection against discriminations based on sex (or race, etc.) plus another characteristic. See *Phillips* v. *Martin Marietta Corp., supra* (employment distinction based on parental status excluded only women); *Sprogis, supra* (employment distinction based on marital status excluded only women).

Nor, in our view, can there be a basis for rebutting the *prima facie* discriminatory effect of the pregnancy exclusion in the fact that women (if not absent from work due to pregnancy) are entitled to share equally with men in the benefits afforded by the plans for non-pregnancy-related disabilities. Even if it could be shown that women as a statistical group are receiving a larger proportional share than men of these other benefits, that would not compensate for

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is no sexually neutral basis for the exclusion from these plans of pregnancy-related disability.

To the extent the pregnancy exclusion may reflect concern with possible malingering or with the possibility that the employee may not return to work after the period of disability, there are obvious means available for dealing more comprehensively with those concerns without discriminating against pregnancy-related disabilities.

the fact that only women (including women who may never receive any benefits) are subject under the plans to a substantial risk of total income loss because of medical disability. Insulating men from that risk while leaving women subject to it is necessarily discriminatory—regardless of whether evidence of costs and actuarial statistics could ever be used (short of a showing of business necessity, discussed in point II, *infra*) to rebut the *prima facie* inference of discrimination that would arise from special treatment (such as increased employee premium charges or reduced benefits) of pregnancy coverage within a comprehensive disability plan.[10] The latter issue is, of course,

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[10] An employer providing such special treatment of employees requiring pregnancy coverage might thus seek to distinguish between a statistical rebuttal of a *prima facie* inference of discrimination and the showing of business necessity required to rebut a *prima facie* inference of a violation (when the inference of discrimination remains unrebutted). Whether Title VII permits such statistically based "play in the joints" is a matter of controversy that arises in various contexts. See, *e.g.*, *Manhart* v. *City of Los Angeles*, 387 F. Supp. 980 (C.D. Cal.), pending on appeal, C.A. 9, Nos. 75-2729 and 75-2807 (involving employee pension annuity plans). The Equal Employment Opportunity Commission has, for the most part, taken the position that disparate treatment of individuals on the basis of sex (or race, etc.) can be justified only by a showing of business necessity, and not merely by reliance on statistical characteristics of a protected class to which those individuals (who may or may not be typical of the class) belong. On the other hand, a pertinent regulation of the Wage and Hour Division of the Department of Labor under the Equal Pay Act, 77 Stat 56, as amended, 29 U.S.C. 206(d), interprets that Act as permitting some flexibility in the present context:

"*Contributions to employee benefit plans.* If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited not before the Court since both of the plans here totally exclude pregnancy-related disabilities from coverage.

Petitioners in both cases appear to argue that the exclusion of pregnancy benefits does not violate Title VII because there is no distinction between men and women under the exclusion (see, *e.g.*, Lib. Mut. Br. in *Wetzel* at 21), suggesting that, because men do not become pregnant, the exclusion of pregnancy benefits does not disparately treat men and women employees.[11]

The fact that women have different physical attributes from men does not, without more, justify applying different rules to women employees based on those attributes. "Discrimination is not to be tolerated [under Title VII] under the guise of physical properties possessed by one sex." *Sprogis, supra,* 444 F. 2d at 1198. In cases where employment practices which

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by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." 29 C.F.R. 800.116(d).

[11] To this end, both Liberty Mutual and General Electric place primary reliance on this Court's opinion in *Geduldig* v. *Aiello*, *supra*, which held that the exclusion of pregnancy disability from a California disability insurance, social welfare program did not violate the Fourteenth Amendment by invidiously discriminating against women. For the reasons set forth below (see pp. 18–22, *infra*), the decision in *Geduldig* does not establish that the practice here is not a *prima facie* violation of Title VII.

detrimentally affected women employees were based on physical properties of women generally, this justification has not been accepted as a barrier to the establishment of a *prima facie* case but has been considered only in the context of whether the business necessity defense justifies the sexual classification, or the sexual effect of the particular practice involved. For example, in *Rosenfeld* v. *Southern Pacific Company,* 444 F.2d 1219 (C.A. 9), the employer refused to assign women to certain jobs, based in part on the view that the "arduous nature of the work-related activity renders women physically unsuited for the jobs" (*id.* at 1223). The court in *Rosenfeld* found the exclusion of women to be a *prima facie* violation of Title VII, and then examined the "strenuous physical demands" defense to see if sufficient justification for the practice was presented. See also *Bowe, supra,* and *Weeks, supra* (weight lifting limitations applied only to women were a *prima facie* violation); *Cheatwood* v. *South Central Bell Tel. & Tel. Co.,* 303 F. Supp. 754 (M.D. Ala.) (weight lifting requirement and the possible unavailability of restroom facilities could not justify exclusion of women).

In sum, the classifying factor, pregnancy, is not capable of being applied to both sexes, but is itself sexual in nature. Accordingly, while nearly all disabling conditions are covered, one which is tied directly to sex is not. Even though the pregnancy classification—involving a dichotomy between pregnant females and non-pregnant persons—may be regarded as a sexually "neutral" policy, not aimed at women but only at a particular disability (see *Geduldig* v. *Aiello, supra,* 417 U.S. at 496–497, n. 20), the *prima facie* case of discrimination under Title VII is not disproved. For the pregnancy exclusion is, nonetheless, an instance of the application of an employment practice only to women, resulting in the denial of a benefit. And it is settled under Title VII that when an employment practice has the practical effect of distinguishing among employees on the basis of a prohibited factor to the substantial detriment of one such class, a *prima facie* violation of the statute has been proved. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs, supra,* 401 U.S. at 432.[12]

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[12] Accordingly, all circuits have accepted the view that a statistical demonstration of a substantial disparate effect, regardless of motivation, on a characteristic covered by Section 703(a), is a *prima facie* violation of Title VII. *Boston Chapter, NAACP* v. *Beecher*, 504 F. 2d 1017, 1020, n. 5 (C.A. 1), certiorari denied, 421 U.S. 910; *United States* v. *Wood, Wire and Metal Lath. Int'l Union, Local No. 46*, 471 F. 2d 408, 414, n. 11 (C.A. 2), certiorari denied, 412 U.S. 939; *Commonwealth of Pennsylvania* v. *O'Neill*, 473 F. 2d 1029 (C.A. 3) (*en banc*); *United States* v. *C & O Ry. Co.*, 471 F. 2d 582, 586 (C.A. 4), certiorari denied, 411 U.S. 939; *United States* v. *Hayes Int'l Corp.*, 456 F. 2d 112, 120 (C.A. 5); *Danner, supra*, 447 F. 2d at 162; *United States* v. *Masonry Contractors Ass'n of Memphis, Inc.*, 497 F. 2d 871, 875 (C.A. 6); *United States* v. *United Bro. of Carpenters and Joiners, Local 169*, 457 F. 2d 210 (C.A. 7), certiorari denied, 409 U.S. 851; *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 368 (C.A. 8); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 550–551 (C.A. 9), certiorari denied, 404 U.S. 984; *Muller* v. *U.S. Steel Corp.*, 509 F. 2d 923, 927 (C.A. 10); *Davis* v. *Washington*, 512 F. 2d 956, 960 (C.A.D.C.), certiorari granted, No. 74–1492 (October 6, 1975).

B. THIS COURT'S DECISION IN *GEDULDIG* V. *AIELLO* DOES NOT BAR A FINDING THAT A CLASSIFICATION BASED ON PREGNANCY VIOLATES TITLE VII

Both employers place primary reliance on this Court's opinion in *Geduldig* v. *Aiello, supra,* contending that the holding of that case is "dispositive" of the issue before this Court (*e.g.,* Br. of GE at 26). There are, however, important differences between the context in which *Geduldig,* a Fourteenth Amendment, social welfare case, arose, and the applicable requirements of Title VII.

Accordingly, six courts of appeals—the only appellate courts which have considered the issue—have stated, in holding or dictum, that *Geduldig* did not determine the validity of the pregnancy exclusion in the context of Title VII's statutory prohibition of any discrimination based on sex, and that such exclusion could amount to sex discrimination in violation of Title VII. See, in addition to the opinions of the two courts below, *Communications Workers of America* v. *American Telephone and Telegraph Co.*, 513 F. 2d 1024 (C.A. 2), petition for a writ of certiorari pending, No. 74-1601; *Satty* v. *Nashville Gas Co.,* 11 FEP Cases 1 (C.A. 6); *Hutchison* v. *Lake Oswego School District,* 519 F. 2d 961 (C.A. 9; *Tyler* v. *Vickery,* 517 F. 2d 1089 (C.A. 5).[13] The two courts below have, of course, explicitly held that exclusion of pregnancy and pregnancy-related disabilities from a general disability program does amount to unlawful sex discrimination in violation of Title VII.[14]

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[13] In *Satty* and *Hutchison* the question was the use of accumulated sick leave, rather than exclusion from a disability program. However, the opinions of the Sixth and Ninth Circuits considered the situation as equivalent to that presented by the exclusion of pregnancy from a disability program. The Fifth Circuit opinion in *Tyler* is not addressed to a sex discrimination claim, but in distinguishing between constitutional and Title VII standards for

In *Geduldig* this Court held that the exclusion of pregnancy and pregnancy-related disabilities from a state-run program of employment disability insurance for private employees does not violate the Fourteenth Amendment by invidiously discriminating against women.

As the court of appeals decisions distinguishing *Geduldig* have noted, questions arising in the social welfare context[15] under the Fourteenth Amendment differ significantly from the issue of statutory construction involved here. The Fourteenth Amendment does not prohibit a policy which, while treating people differently, is reasonably related to a legitimate state interest. In order to prevail a challenger has the burden of showing that the classification is not ra-

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determining discrimination the court in dictum discusses *Geduldig* and indicates its concurrence with the other circuits that *Geduldig* does not govern a Title VII claim of discrimination regarding the differential treatment of pregnancy disability. See also *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651 (C.A. 8), which implicitly finds the *Geduldig* decision inapplicable in a Title VII context.

[14] Congress has also given the question attention since this Court's decision in *Geduldig*. See pp. 24–26, *infra*.

[15] The principal cases relied on in this Court's opinion in *Geduldig* specifically emphasize the fact that they deal with social welfare legislation. See *Jefferson* v. *Hackney*, 406 U.S. 535, 546–547; *Dandridge* v. *Williams*, 397 U.S. 471, 485; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

tionally related to a legitimate state policy, or that it is invidious.

Title VII on the other hand is directed not only to deliberate or irrational acts of employment discrimination. Under Title VII, a practice which is neutral on its face and is not either irrational or a pretext for discrimination is nevertheless discriminatory if it has a substantial disparate effect on a protected class. See p. 17, *supra*, and cases there cited. See also *Wallace* v. *Debron Corp.*, 494 F. 2d 674 (C.A. 8); *Gregory* v. *Litton Systems, Inc.*, 472 F. 2d 631 (C.A. 9).

Indeed, this Court in *Geduldig* specifically relied (417 U.S. at 495) on the proposition "that, consistently with the Equal Protection Clause, a State 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . .' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 * * *." But, in contrast to the state legislation at issue in *Geduldig* and in *Williamson*, Congress in Title VII took the broad view that all forms of employment discrimination—on the basis of race, sex, religion and national origin—should be abolished. Congress, in other words, decided to cover the field comprehensively rather than take one step at a time.

That Title VII standards are more stringent than the rational basis standard under the Fourteenth Amendment is well recognized, both by Congress and the courts. The extension of coverage to the states as employers in the 1972 amendments to Title VII represented an at least implicit recognition by Congress that Fourteenth Amendment standards, to which the states were already subject as employers, are in some respects less exacting than Title VII standards.

And, in several factual contexts, the differences between Title VII and Fourteenth Amendment standards have been found by the courts to require different legal results. State protective labor laws restricting the weight women can lift, the hours women can work, or other conditions of women's employment, have traditionally been upheld under the Fourteenth Amendment as permissible regulation of the public health and safety.[16] Under Title VII, however, state maximum-hour and weight-lifting laws for women, which have the effect of limiting their employment opportunity, have uniformly been struck down. *Weeks* v. *Southern Bell Tel. & Tel. Co., supra; Rosenfeld* v. *Southern Pacific Company, supra.* Similarly, in *Goesaert* v. *Cleary,* 335 U.S. 464, the Court upheld, against an Equal Protection attack, a state law restricting employment opportunity in bartending to women who were the wives or daughters of male bar owners. A contrary result was reached under Title VII since it could not be shown that male sex was a bona fide occupational qualification necessary to the performance of the job. *Krause* v. *Sacramento Inn*, 479 F. 2d 988 (C.A. 9).[17]

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[16] In *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 398, in upholding a state minimum wage law for women as protective legislation, the Court stated:

"[T]imes without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

In short, as the courts of appeals have unanimously held, the fact that a policy has been held not to violate the Fourteenth Amendment is not a holding that it does not violate Title VII. Accordingly, the *prima facie* cases of statutory violation shown here (see point IA, *supra*) stand unrebutted by petitioners' reliance on *Geduldig*.

C. GUIDELINES ISSUED BY THE RESPONSIBLE ADMINISTRATIVE AGENCY PROPERLY INTERPRET TITLE VII TO PROHIBIT THE EXCLUSION OF PREGNANCY-RELATED DISABILITY FROM AN OTHERWISE COMPREHENSIVE DISABILITY BENEFITS PLAN

The Equal Employment Opportunity Commission sex discrimination guidelines, 29 C.F.R. 1604.9 and 1604.10, explicitly provide that disabilities caused by pregnancy are, for purposes of disability insurance plans, to be treated as are all other temporary disabilities. 29 C.F.R. 1604.10(b).[18] The courts of appeals in both *Gilbert* and *Wetzel* relied on the guidelines, indicating that they are entitled to "great deference" (*Wetzel*, 511 F. 2d at 204; *Gilbert*, Jt. Supp. Pet. at

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[17] See also *Kotch* v. *Board of River Pilot Commissioners*, 330 U.S. 552; *Tyler* v. *Vickery*, 517 F. 2d 1089 (C.A. 5); *Smith* v. *Troyan*, 520 F. 2d 492 (C.A. 6), petition for a writ of certiorari pending, No. 75-734.

[18] The EEOC Guidelines are set forth in the Appendix, *infra*, p. 33.

5a, n. 12). This Court has consistently paid such deference to guidelines properly issued by federal agencies given the responsibility for their promulgation. See, *e.g. Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 431; *Griggs* v. *Duke Power Co., supra.,* 401 U.S. at 433-434; *Udall* v. *Tallman,* 380 U.S. 1.

Petitioner GE contends that the EEOC Guidelines are not entitled to judicial deference because they were not issued contemporaneously with the congressional statute they interpret, and because EEOC has, in the past, taken an assertedly contrary view. While there are circumstances in which such guidelines may not be entitled to judicial deference, see, *e.g., Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, this is not a case in which the guidelines are inconsistent with an obvious congressional intent.[19] Further, this Court, in *Espinoza,* did not state that simply because a guideline is not issued contemporaneously with a statute, or because an agency changes its position on an issue, the guideline is due no deference. To the contrary, the Court in *Espinoza* specifically noted that the Commission had changed its position on the issue involved there and stated that "[t]he Commission's more recent interpretation of the statute in the guideline * * * is no doubt entitled to great deference" (414 U.S. at 94) while holding that it must nonetheless be rejected because of what the Court found to be "an obvious congressional intent" to the contrary (*ibid.*).[20]

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[19] In *Espinoza,* this Court held that the term "national origin" in Title VII did not prohibit discrimination on the basis of an individual's status as an alien. The EEOC guideline had interpreted the term "national origin" to include discrimination on the basis of citizenship. The Court held that this guideline was not valid if it meant that there could be no discrimination on the basis of citizenship alone, but that it could be valid in situations where a citizenship requirement would have the effect of discrimination on the basis of national origin, a problem not presented in *Espinoza.* See 414 U.S. at 93.

Here, not only is there no indication of a legislative intent contrary to the Commission's guidelines in the legislative history of Title VII,[21] there is also some recent indication that Congress does not disagree with that interpretation. This results from the fact that Congress recently had the opportunity to review closely analogous guidelines promulgated by the Department of Health, Education, and Welfare. Those regulations (45 C.F.R. Part 86, as added, 40 Fed Reg. 24128), which deal with the issue of sex discrimination in federally assisted educational institutions, were promulgated at the direction of Congress, see Title IX of the Education Amendments of 1972, 20 U.S.C. (Supp. II) 1681, and signed by the President. The underlying statute, with exceptions not here relevant, provides in pertinent part that (20 U.S.C. (Supp. II) 1681(a)):

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[20] In addition, the Court in *Espinoza* found some federal employment practices to be in conflict with the EEOC guideline discussed in that case. 414 U.S. at 89–90. In the present case, federal pregnancy leave practices are fully consistent with the guideline at issue here. See p. 3, n. 1, *supra*.

The Office of Federal Contract Compliance of the Department of Labor has issued guidelines concerning sex discrimination by federal contractors, which state that, in the area of contributions to insurance plans, an employer is not in violation of the guidelines if his contributions are the same for both sexes, or if the resulting benefits are equal. 41 C.F.R. 60–20.3(c). However, more recent proposed guidelines published, but not yet adopted, by OFCC state that pregnancy and pregnancy-related disabilities must, under an employer's insurance plan or sick leave policy, be treated as a temporary disability, subject to the same treatment as all other temporary disabilities. 38 Fed. Reg. 35338.

[21] The excerpts from the legislative history of the proposed Equal Rights Amendment quoted by petitioner GE (Br. 37–41) do not purport to interpret Title VII and do not discuss the question of pregnancy coverage in disability insurance plans.

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program activity receiving Federal financial assistance * * *.

Section 86.57(c) of the Regulations (40 Fed. Reg. 24144) adopted to implement this provision specifically states:

> (c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

This regulation is essentially similar to the EEOC guideline (Appendix, *infra*) at issue in this case. Accordingly, if the HEW guideline and, similarly, the EEOC guideline were in conflict with congressional intent, Congress had the opportunity to so indicate by withholding its approval of the HEW guideline, for, in the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484, Congress required that any regulations implementing Title IX be submitted to both Houses for a review period of forty-five days prior to their implementation.[33]

There is, in sum, no reason to believe that the EEOC guideline at issue here is inconsistent with congressional intent, and the courts below accordingly did not err in relying on it.

II

THE BUSINESS CONSIDERATIONS PROFFERED BY PETITIONERS DO NOT PROVIDE SUFFICIENT JUSTIFICATION TO OVERCOME THE *PRIMA FACIE* VIOLATION OF TITLE VII

Petitioners in both cases offer several considerations to justify the exclusion of pregnancy disability from their plans. Both state that they advert to such "considerations" in order to disprove any intent on their behalf to discriminate against women (see Br. of Lib. Mut. at 15–20; Br. of GE at 53–61). However, as stated above (see pp. 11, 17, 20, *supra*), proof of discriminatory intent is not prerequisite to demonstrating a *prima facie* violation of Title VII.

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[33] Several members of the House indicated that their review of the HEW regulations would be for the purpose of determining whether any of those regulations would be "inconsistent with the law." See 120 Cong. Rec. H12332-12334 (daily ed. Dec. 19, 1974). The pregnancy regulations were brought to the attention of the Senate by Senator Helms (121 Cong. Rec. S9714–9715 (daily ed. June 5, 1975)) and a resolution of disapproval was introduced by him, but no action was taken on the resolution.

Under Title VII, an employer may rebut a *prima facie* case in a variety of ways. See, *e.g.*, *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431. In *Robinson* v. *Lorillard Corp*, 444 F. 2d 791 (C.A. 4), the court articulated as follows the standard for measuring an employer's business justification for a practice which has been found to deny employment benefits to a class of individuals protected by Title VII (*id.* at 798):

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.

Here, however, no issue of safety or efficient operation of the employer's primary business is involved, and the issue of cost is the only possible defense. The court's opinion in *Lorillard* and the relevant EEOC guideline (see 29 C.F.R. 1604.9(e)) indicate that a showing of increased cost generally is an insufficient defense to a *prima facie* violation of Title VII.[23] At the very least, we submit, the inquiry in the present circumstances should be whether the adjustment necessary to eliminate the discriminatory effect of the practice would be so financially burdensome as to jeopardize the entire benefit plan."[24]

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[23] See also *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954; *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F. 2d 301 (C.A. 8), certiorari denied, 409 U.S. 1107.

In support of their contentions that business considerations militate against extension of disability benefits to women, petitioners offer the following reasons, none of which, in our judgment, suffice to rebut the violation demonstrated.

1. Both petitioners suggest that the "voluntary" aspect of pregnancy justifies the exclusion of pregnancy-related disability from their plans. As stated above (see p. 12, n. 9, *supra*), we note that this distinction, insofar as it has any validity, has been applied only to a disability which occurs solely in women and not to other voluntary disabilities. Also, the actual disability suffered (see I App. 329–330, 362 (testimony of Dr. Forrest), II App. 514 (testimony of Dr. Hellegers)) is like all others covered by the plans in that it generally includes hospitalization for some time and a further period of recuperation.

Similarly, GE states (Br. 55) that the plan's benefits are "intended to soften the blow to employees of an unintended and unexpected sickness or accident" and attempts to distinguish pregnancy on this ground. However, the GE plan does cover other "expected" illnesses (II App. 647–648) and does not cover unexpected complications of pregnancy.

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[24] See also *Dias* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (C.A. 5); *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (C.A. 2).

Both GE (Br. 56) and Liberty Mutual (Br. 19) state that, due to their belief that a high percentage of women do not return to work following childbirth, pregnancy disability benefits would be a form of "severance pay," a type of benefit not intended by the program. However, there is no indication that when an employee under the existing plans fails to return to work after an absence due to disability, the company seeks to retrieve the money paid so that no "severance pay" is disbursed under the guise of disability benefits.

2. Petitioner GE also states that payment for pregnancy disability would encourage women to leave work earlier and return later than if pregnancy disability were not covered (Br. 56). This absence from employment, the petitioner asserts, would be predicated on the well being of the child, particularly in the period following delivery (*ibid.*).

This contention ignores the fact that it is only the treatment of pregnancy disability which is at issue in these cases. The decisions below do not require an employer to grant a woman leave before disability is suffered, or following recovery from disability; any non-disability leave would be granted by the employer regardless of the outcome of the issue presented here. The precise period of actual disability which would have to be covered by the plans would be determined as it is for all other disabilities—by medical verification, and petitioners offered no evidence to indicate that a requirement of medical verification would be less effective when determining the period of pregnancy disability than for any other condition covered by the plan.[25]

GE's concern that providing women pregnancy disability leave will lead to a demand by men for paid child-care leave is similarly unfounded. The payment of disability benefits for pregnant women would depend on proof of actual disability.[26] Men requesting child-care leave are, of course, suffering no disability. Any such request by men could be made only when an employer permits women to obtain leave, for child-care purposes, beyond their recovery. (Of course, since the women are, at that point, not disabled, they are not entitled to disability benefits.) To the extent that an employer allows women employees such "child care" leave, the employer may be obligated to provide it to men. See *Danielson* v. *Board of Higher Education*, 358 F. Supp. 22 (S.D. N.Y.); 29 C.F.R. 1604.9(b). However, the court of appeals decisions in the present cases in no way require employers to grant such non-disability, child-care leave to either women or men, and in no way suggest that leave of this type must be compensated from a disability insurance plan.

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[25] The GE plan states that "to collect these [disability] benefits, you must be under the care of a physician for the treatment of your disability and your claim must be certified by a physician" (III App. 1065). See also III App. 1097. Medical testimony at the *Gilbert* trial indicated that it is no easier for one to falsify disability following pregnancy than it would be for one following recovery from any other disability (I App. 337-338; II App. 476), and there was some indication that recovery from pregnancy is easier to determine medically than recovery from some other disabilities. GE's actuary stated that GE's prediction of malingering and claim abuse by women was not based on actual evidence concerning pregnancy, but that malingering and claim abuse was a "general problem" (II App. 535). Accordingly, GE did not demonstrate that claim abuse would be a greater problem for pregnancy disability than for any other disability.

[26] See p. 29, n. 25 *supra*.

3. Petitioner GE introduced some evidence concerning the increased cost of pregnancy coverage. However, that evidence is based on a critical misconception. The evidence introduced at the trial indicated that, on the average, a woman's actual pregnancy-related disability was for a period of six weeks; in other words, that doctors normally checked a woman six weeks after childbirth on the basis that, if no problems had developed, a woman would be fully recovered by that time (I App. 329–330; II App. 465, 500); and medical testimony at the trial indicated that, in many instances, women could recover in as little as two or three weeks following delivery (I App. 330; II App. 466). Medical testimony also indicated that, in most instances where there had been no complication, actual disability did not occur until actual labor and delivery (I App. 321; II App. 460).

The GE actuary who testified (see GE Br. 8, 58) to the estimated increase in benefits paid nationwide, if pregnancy disability were reimbursed, based his calculation on the following presumed duration of pregnancy-related absences: 13 weeks under plans paying benefits for 13 weeks; 23 weeks for plans paying benefits for 26 weeks, and 30 weeks for plans paying benefits for 52 weeks. (See III App. 847, GE Ex. 42.)

This ignored the fact that the average actual period of *disability*, which is the only basis for entitlement to payment, was proved at trial to be *six* weeks, not thirteen, twenty-three, or thirty. For this reason, the figures presented by GE are not accurate when increased cost of covering pregnancy disability is to be considered.[27]

In addition to this erroneous basis, the figures provided by GE referred to nationwide cost, not the cost to GE. Accordingly, the figures do not indicate the extent of the financial effect that the relief requested would have on the disability insurance plans and, hence, certainly do not suffice to establish a business necessity defense to the *prima facie* violation of Title VII demonstrated by the plaintiffs.

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[27] In fact, these figures were based on leaves taken when no medical proof of disability was required (II App. 563).

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted.

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APPENDIX

EEOC GUIDELINES

29 C.F.R. 1604.9. Fringe benefits:

* * * * *

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

* * * * *

29 C.F.R. 1604.10. Employment policies relating to pregnancy and childbirth:

* * * * *

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

* * * * *

Mr. Days. The Supreme Court, however, disregarded. Mr. Justice Stevens stated that:

> The rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.

We believe that the views expressed by Mr. Justice Stevens and other dissenters, the EEOC guidelines, the courts of appeals which had reached the issue, and the Department of Justice were consistent with the purpose of title VII: To remove artificial and discriminatory barriers to equal participation in the work force.

Therefore, this administration wishes to endorse and lend its support to efforts to amend title VII to carry out what we believe to have been Congress' intent when it included the prohibition against sex discrimination in title VII.

I believe that H.R. 5055 is a simple, effective vehicle for achieving that end, and I would like to make a few short points about this legislation.

The prohibition against discrimination contained in H.R. 5055 would apply to all aspects of the employment process—to hiring, reinstatement rights, seniority, and other conditions of employment covered by title VII as well as to disability benefits.

The basic purpose of the bill, therefore, is to ensure that pregnancy related disabilities are treated the same as all other temporary disabilities. H.R. 5055 achieves this goal by amending the definition section to title VII, so that it is clear that for purposes of title VII, discrimination on account of pregnancy is sex discrimination.

Amendment of the definition portion of title VII appears more appropriate than an alternative, which would be to add a new, separate prohibition to the act.

What I believe we are attempting to accomplish through this legislation is to clarify what many of us thought was the original intent of the act.

The bill makes it clear that an employer could not attempt to use any interpretation of the Equal Pay Act which might be inconsistent with title VII's amended definition of sex discrimination as a defense to a charge that he discriminated on account of pregnancy.

The proposed legislation does not purport to elevate pregnancy above other employment disabilities, and require employers to assume the costs of pregnancy when they would not do so with regard to other physical disabilities.

Nothing in the bill, for example, requires an employer to have a disability plan for employees. Nor does H.R. 5055 regulate an employer's obligations with regard to employees' absences due to child care obligations; such absences are not due to medically determinable conditions related to pregnancy.

What is required is that pregnant employees who are able to work be treated like others who are similarly able to work; and that pregnancy related disabilities be treated the same as the disabilities of other employees.

We do have one suggestion regarding the language of the bill. Title VII refers in various places, not only to "because of sex" and "on the basis of sex," but also to "upon the basis of sex" and "on the basis of such individual's sex."

In order to ensure that this new definition of sex discrimination applies to all provisions of the act, this subcommittee might consider including the latter two phrases.

We do not anticipate that legislation such as the one before the subcommittee will result in any long term increase in the Federal court case load, a matter of interest to the Justice Department, certainly.

To the extent that, after *Gilbert*, there are other questions remaining regarding discrimination on account of pregnancy, this legislation will aid the courts by clarifying the meaning of title VII in this area.

Although there might be an initial spate of suits to enforce this amendment, we believe that because of the nature of the rights protected by it, most employers will come into compliance with the amendment in a relatively short period of time, thus vitiating the need for extensive litigation.

Moreover, as the bulk of the law developed prior to the *Gilbert* decision treated discrimination based on pregnancy as sex discrimination, many employers were already complying with the proposed legislation prior to *Gilbert*. The net result, we believe, will be neither a substantial increase or decrease in the Federal court caseload.

H.R. 5055 is attractive in its simplicity. We believe that it would accomplish an exceedingly important end. Discrimination based on pregnancy and related medical conditions has a dramatic negative impact on the employment opportunities and expectations of women in the national workforce.

The economic impact on women and their families when pregnancy temporarily disables a woman employee is as great as the impact of other temporary disabilities; and it comes just as the employee has another mouth to feed.

Disability insurance plans and sick leave plans are designed to cushion the economic consequences of temporary disabilities. It is unfair to exclude a major disability suffered only by one sex, when other disabilities are covered.

The fundamental purpose of title VII, as it prohibits discrimination on account of sex, is to make men and women equals in the market place. To the extent that women employees are required to absorb economic costs and disadvantages because of pregnancy, this goal cannot be met.

For these reasons, I hope that Congress will act upon this legislation with dispatch.

Thank you very much.

Mr. HAWKINS. Thank you, Mr. Days.

The next witness is Alexis Herman, director of the Women's Bureau, Employment Standards Administration, Department of Labor.

Your statement, in its entirety, will be entered in the record at this point, without objection.

[Statement referred to follows:]

STATEMENT OF
ALEXIS HERMAN, DIRECTOR
WOMEN'S BUREAU
EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE SUBCOMMITTEE ON
EMPLOYMENT OPPORTUNITIES
U.S. HOUSE OF REPRESENTATIVES
APRIL 6, 1977

Mr. Chairman, and Members of the Subcommittee:

I welcome this opportunity to appear before you today to discuss a matter of importance to the working women of this nation and their families. This Subcommittee has been at the forefront of efforts to insure equal treatment under the laws for all. A new situation makes it necessary for you and the entire Congress to act once again.

I would like to take a few moments to discuss the effects of the Supreme Court's decision in the case of General Electric Company v. Gilbert, announced on December 7 of last year. This decision has evoked a great deal of discussion and strong reactions among legal scholars, civil rights activists, and others who are committed to the principle of equal employment opportunities for women. Therefore, I do not believe that it is necessary for me to discuss the decision in detail at this time. For the purposes of this hearing, I will merely summarize it by stating that the Court held that the exclusion of pregnancy disability benefits from an employer's otherwise comprehensive non-occupational disability insurance plan is not discrimination under Title VII of the Civil Rights Act of 1964 in the absence of a showing that the exclusion is a pretext for discriminating against women.

It is the Department of Labor's conviction that discrimination based on pregnancy is discrimination based on sex.

Not guaranteeing equal rights and equal benefits could clearly work to the economic and employment disadvantage of many of this Nation's employed and employable women and their families. This hardship is particularly true for female family heads, 3.9 million of whom were in the labor force in March, 1975. Accordingly, we believe that the Congress should now take steps to enact legislation which would make clear the intent of Congress to provide that employers who have medical disability plans must provide for disability due to pregnancy on an equal basis with other medical disabilities. Such action would be consistent with the President's repeated expressions of his commitments to, and concerns for, American workers, American women, and American families.

Mr. Chairman, the bill before the Subcommittee, H.R. 5055, would amend the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, to expand the prohibitions against employment discrimination "because of sex" or "on the basis of sex" to include discrimination based upon pregnancy, childbirth, or related medical conditions. The bill further states that women affected by pregnancy, childbirth, or related medical conditions are to be treated the same for all employment related purposes, specifically including receipt of benefits under fringe benefit programs, as others not so affected but similar in their ability or inability to work.

The Labor Department fully supports the underlying concept of this legislation. We have long held the position that women should not be penalized in their conditions of employment on account of child bearing.

The Department of Labor and others have been looking at the Gilbert decision and considering methods of guaranteeing equal benefits to women. We have concluded that amending Title VII in this fashion is an appropriate course of action. It permits Congress to address the issue in a simple bill. We are aware that other legislation not dealing with the pregnancy disability issue has been proposed which would amend Title VII and other civil rights laws in a variety of ways. H.R. 5055 has no bearing on the others. It seeks to correct an injustice which should not be allowed to stand during the many months when more complex matters may be debated.

The Women's Bureau over the years has found that many employers feel a primary responsibility to provide the best jobs and optimum benefits to men on the assumption that they are the breadwinners of their families and that women, particularly women with children, are not seriously attached to the workforce. Such an assumption is in error. One of the most striking demographic changes that has taken place in the post World War II era has been the increase in the labor force participation of women with children. The figures demonstrate that women are having fewer children, and that they are remaining in the workforce or re-entering it to provide income for their families, even when their children are very young. Indeed, working mothers are seriously attached to the labor force. As of March, 1976 about 5.4 million working women had children under the age of 6, and of these, 2.5 million had children under 3 years of age. Discrimination on the basis of pregnancy makes it difficult for women to remain in the labor force and maintain the continuity of their family incomes when they have children. And in many families the woman's earnings are essential in raising their families' total income above the poverty level.

Mr. Chairman, the question of increased costs due to the legislation has been raised, and I would like to make some observations on this matter. These increases should not be overstated.

Assuming a continuation of the present fertility rate of 1.7 births over a woman's life and a 2/3 earnings replacement rate on 1976 earnings for a six week benefit period for temporary disability due to pregnancy, our preliminary data indicate a total payment of $582 per birth or $1,030 per woman over her working life. This $1,030 represents only one-third of one percent of the total lifetime earnings for the average female worker. We are in the process of further developing these figures, and we will be glad to share them with the Subcommittee once this work has been completed.

I might also note that pregnancy disability benefits are required, by law or court decision, in several States, including California and New York. This fact results in a substantial reduction in the total cost increase that could be attributed to the bill.

In conclusion, Mr. Chairman, the denial of equal employment rights constitutes a serious setback for women in their efforts to better themselves, to support their families, and to become full, active and productive participants in our society. They look to the Congress to correct this situation. In this regard, I ask you to note the wide diversity of women's groups who have joined together to support legislation.

The Department of Labor is fully committed to the principle of equal employment opportunities for women. We will work with this Subcommittee and the Congress to effectuate this end. You may feel free to call upon us for whatever assistance we might be able to provide you.

Mr. Chairman, this concludes my prepared statement. I would be pleased to answer any questions you or the members of the Subcommittee might have.

Thank you

Mr. **Hawkins.** Ms. Herman, you may proceed.

STATEMENT OF ALEXIS HERMAN, DIRECTOR, WOMEN'S BUREAU, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR

Ms. **Herman.** Thank you, Mr. Chairman.

I would like to introduce Carin Clauss, our solicitor at the Department of Labor.

Mr. **Hawkins.** We are pleased to have you all with us this morning.

Ms. **Herman.** As the director of the Women's Bureau for the U.S. Department of Labor, an Agency whose mission is to formulate standards and policies to improve and promote the welfare of working women, I welcome this opportunity to appear before you today to discuss a matter of importance to the working women of this Nation and their families, the passage of H.R. 5055.

It is the Department of Labor's conviction that discrimination based on pregnancy is discrimination based on sex. To deny equal rights and equal benefits because of pregnancy could clearly work to the economic and employment disadvantage of many of this Nation's employed and employable women and their families.

Accordingly, in view of the Supreme Court's decision in *General Electric Company* v. *Gilbert*, we believe that the Congress should now take steps to enact legislation which would make clear the intent of Congress to provide that employers who have medical disability plans must provide for disability due to pregnancy on an equal basis with other medical disabilities.

Such action would be consistent with the President's repeated expression of his commitments to, and concerns for, American workers, American women, and American families.

The bill before the subcommittee, H.R. 5055, would amend the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, to expand the prohibitions against employment dsicrimination because of sex, or on the basis of sex, to include discrimination based upon pregnancy, childbirth, or related medical conditions.

The bill further states that women affected by pregnancy, childbirth, or related medical conditions are to be treated the same for all employment related purposes, specifically including receipt of benefits under fringe benefit programs, as others not so affected but similar in their ability or inability to work.

The Department of Labor has studied H.R. 5055, and we have concluded that amending title VII in this fashion is an appropriate course of action. It permits Congress to address the issue in a simple bill, in order to correct an injustice which should not be allowed to stand.

Mr. Chairman, despite some thoughts to the contrary, working mothers are seriously attached to the labor force, and are often the bread winners of their family, as Commissioner Walsh has so eloquently stated.

We are not here to have a casual flirtation with the market. Indeed, as of March 1976, about 5.4 million working women had children under the age of 6, and of these 2.5 million had children under the age of 3.

Discrimination on the basis of pregnancy makes it difficult for women to remain in the labor force and maintain the continuity of their family incomes when they have children. In many families the woman's earnings are essential in raising their families' total income above the poverty level.

The question of increased cost due to the legislation has been raised. These increases should not be overstated. We have provided, as a part of our written testimony, preliminary data, and I stress that this is preliminary data, to suggest to you work that the Department of Labor is beginning on this issue.

We will be happy to submit to this committee our findings on this issue, for the record, as well as information of the various plans at the State level that are now in effect.

Mr. HAWKINS. These findings to which you refer, are they available now, or are they in the process of being developed?

Ms. HERMAN. We have a task force that is at work on this issue, and we are estimating a 2 week period on these figures.

Mr. HAWKINS. As soon as these findings are available, we hope that you will make them available to the committee for inclusion in the record.

Without objection, we will have them entered in the record at this point.

[Materials to be furnished follow:]

U.S. DEPARTMENT OF LABOR,
EMPLOYMENT STANDARDS ADMINISTRATION,
WOMEN'S BUREAU,
Washington, D.C., May 31, 1977.

Hon. AUGUSTUS HAWKINS,
Chairman, Subcommittee on Employment Opportunities, Committee on Education and Labor, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During my testimony before your Subcommittee on H.R. 6075, I promised to submit for the hearing record the Department of Labor's estimate on the cost impact of extending the coverage of private sector temporary disability insurance to include pregnancy disability.

I am pleased to submit the attached information for the record and for the Subcommittee's consideration. The data were prepared with the assistance of the Department of Commerce and reflect the government's best estimate. They cover only the estimated cost of disability payments and not any increase in medical costs which might result where employers have excluded maternity costs from their health insurance plans.

The Office of Management and Budget advises that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

ALEXIS HERMAN,
Director.

Enclosure.

ESTIMATED COST IMPACT OF H.R. 6075

The Department of Labor, in response to the request of Chairman Hawkins, submits this cost impact estimate for inclusion in the record. Our best estimate on the cost impact of extending the coverage of private sector temporary disability insurance to include pregnancy disability amounts to only .05 percent of the estimated payroll for private sector wage and salary earners covered by temporary disability insurance plans in 1976. (It should be pointed out that costs of private sector health insurance also will be affected by H.R. 6075. However, precise data on the cost impact could not be estimated reliably. A fuller explanation of the problems in this area is presented infra, p. 5.)

Our estimate assumes an average benefit period of pregnancy disability of 7½ weeks. The estimate is also based on the fact that about 34.2 million workers in the private sector were covered by temporary disability insurance plans in 1976 and of that number, 14.5 million workers participated in plans which excluded pregnancy disability for benefit eligibility purposes.

We estimate that the cost increase of H.R. 6075 will amount to 20 cents per week per worker, for employees now covered under a TDI plan which excludes pregnancy. There will be a cost increase of 4 cents per week per worker for employees now covered under TDI plans which provide limited pregnancy disability benefits. The Department's estimate of the total cost increase (including administrative costs) is $191.5 million, or only 3.5 percent of total contributions required. These total dollar amounts are relevant only when compared to contributions, number of workers, or total payroll. We believe it is also essential to note that temporary disability insurance contributions represent only 1.4 percent of the wage package for covered workers in private industry and H.R. 6075 will increase that percentage only to 1.50 percent. This total amounts to only 1½ cents per dollar of wages.[1]

It is also clear from the experience of employers already covering pregnancy disability in their TDI plans that the percentage of employees who return to their jobs after recovering from pregnancy disability improves markedly with coverage. These employers have expressed the view that the significant savings to employers in training and recruitment costs more than offset the added contributions required to cover pregnancy.

As noted above, the Department's cost estimates are based on an average disability period of 7½ weeks. This figure, cited by the Chamber of Commerce, as the experience of a large corporate employer in 1977, was corroborated by other large employers whose plans cover pregnancy disability. While some quoted figures have been slightly higher, we believe that 7½ weeks reflects the experience of the better administered and more tightly controlled plans. Also considered is the fact that most plans do not pay benefits until the eighth day of disability.

Alternative calculations were also made based on assumptions of 6 weeks of benefits and 9 weeks of benefits. The 6-week assumption was chosen as an approximation of the average length of benefits under plans which now provide limited pregnancy disability coverage. The 9-week assumption was included for comparison purposes. The cost estimate incorporates a 20 percent adjustment for administrative costs.[2] The attached tables reflect costs both with and without this overhead assumption.

In order to determine cost impact, the Department based its estimate of TDI coverage on data from the Social Security Administration (see table I, fn. 1) adjusted to apply to 1976, and from labor force data from the Department of Labor. We believe these data better reflect coverage than the Source Book of Health Insurance Data 1976–1977, insofar as they eliminate double counting of employees covered by more than one disability plan and eliminate private plans not covered by the proposed legislation.

Data were disaggregated by industry according to health plan estimates contained in the March 1977 Social Security Bulletin.[3] The disaggregation by industry for TDI plans is considered to be closely correlated to that of health plans. Industry calculations were made in order to reflect differences in plan coverage by industry, differences in the percent of women workers by industry, and differences in wage rates by industry.

In order to determine the expected number of births, the 1975 birth rate was applied to each industrial grouping for all women workers between 15 and 44 years of age covered by temporary disability insurance plans and for women covered by those TDI plans now providing limited pregnancy benefits. The high labor force participation rates of women of all ages made it reasonable not to adjust for age distribution. Similarly, differences in birth rates for women workers and other women should now be minimal with increased female participation in the labor force.

The wage data for women are based on the May 1976 Current Population Survey, which shows the latest figures available. The estimates assume that women receive 60 percent of their weekly earnings during the period of disability.

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[1] All figures, of course, are subject to the changes brought about by an expanding labor force and increases in prices and wages in subsequent years including the current year, 1977.

[2] The administrative cost adjustment is based on the average percentage difference between benefits and contributions for temporary disability insurance over the five year period from 1970–1974. See Alfred M. Skolnik, "Twenty-Five Years of Employee Benefit Plans," Social Security Bulletin, September 1976.

[3] See Daniel N. Price, "Private Industry Health Insurance Plans: Type of Administration and Insurer in 1974," Social Security Bulletin, March 1977.

The expected cost increase is calculated by subtracting the cost of benefits now provided under plans covering pregnancy from total anticipated temporary disability insurance benefit payments for pregnancy disability. The payroll of private sector employees covered by TDI plans is derived from estimates of the total number of workers covered and average weekly earnings for all covered workers by industry.

Finally, the Social Security Administration's[4] 1974 data on TDI contributions were updated to 1976, expanded to include all relevant TDI coverage, and adjusted by the Consumer Price Index. Increased costs due to expanded coverage for pregnancy benefits were then related to total contributions in order to reflect relevant impact.

The costs of private sector health insurance will also be affected by H.R. 6075. However, precise data on the cost impact of the bill with respect to health insurance plans could not be estimated reliably. Published data from the Social Security Administration with information on dependent's health care coverage are only available through 1970.[5] Thus, this coverage would have to be extrapolated to 1976 with adjustments for the ratio in employment and significant further adjustments to assess costs for dependents, which is, of course, unnecessary in the temporary disability insurance context. Delivery and maternity hospitalization costs would also have to be gathered and these vary widely across the country. An assessment would be needed of the prevalence and completeness of maternity benefits currently offered by health plans.

The variations among health plans also make it extremely difficult to reach supportable estimates. For instance, certain plans exclude a variety of medical conditions including pregnancy. Many plans have a dollar cap on pregnancy payments but not on other conditions. Finally, there are plans which treat pregnancy equitably either through similar percentage payments for all conditions or through similar dollar limitations.

In summary, data limitations have made it impossible to provide the committee with cost estimates which we consider would fairly represent the impact of H.R. 6075 on health insurance.

TABLE 1.—TEMPORARY DISABILITY INSURANCE COVERAGE—PRIVATE SECTOR, 1976

	Number of workers (millions)	Percent of workers
Source of temporary disability (short-term) coverage:		
(1) Private plans [1]	25.3	74.0
(2) State-administered funds [1]	8.4	24.6
(3) Railroad Retirement Board administered plan	.5	1.5
(4) Total—temporary disability insurance coverage affected by H.R. 6075 [2]	34.2	100.0
(5) Temporary disability coverage now providing limited benefits for pregnancy disability [3]	19.7	57.6
(6) Coverage for pregnancy disability newly required under H.R. 6075	14.5	42.4

[1] Five states have temporary disability laws. California, New Jersey, and New York permit substitution of a private plan for the State plan; Hawaii has no State plan; and Rhode Island does not permit substitution. The estimate on line (2) is based on unpublished data furnished by State temporary disability offices to the Unemployment Insurance Research Office Employment Training Administration, U.S. Department of Labor.

[2] This total represents the sum of lines (1) through (3).

[3] Estimate on line (5) based on assumption that 40 percent of workers covered by weekly accident and sickness benefits for nonmaternity disabilities are also covered for maternity disabilities; and that 100 percent of workers covered by paid sick leave State TDI plans and by the Railroad Retirement Board administered plan are covered for maternity disabilities.

Source: Data from Daniel N. Price, "Cash Benefits for Short-Term Sickness, 1948–74," Social Security Bulletin, July 1976 and from Alfred M. Skolnick, "Twenty-five Years of Employee Benefit-Plans," Social Security Bulletin, September 1976. These data relate to private plans in 1974. The estimate in line (1) was increased by a factor of 1.039 to account for the growth in the labor force between 1974 and 1976. This growth rate was computed from "Table A1 Employment Status of the Noninstitutional Population," 1929 to date, U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings, March 1977, vol. 24, No. 3. Of the estimated 5,000,000 workers (Social Security Administration's unpublished working figure) with paid sick leave, it was assumed that only 25 percent had more than a few weeks of paid sick leave and all of these workers were covered for maternity disabilities.

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[4] Alfred M. Skolnik, "Twenty-Five Years of Employee Benefit Plans," Social Security Bulletin, September 1976.

[5] See W. W. Kolodrubetz, "Two Decades of Employee Benefit Plans, 1950–70 : A Review," Social Security Bulletin, April 1972.

TABLE 2.—WORKERS COVERED BY TEMPORARY DISABILITY INSURANCE BY INDUSTRY

Industry	Percentage of workers by industry [1]	Temporary disability coverage (millions of workers)	Temporary disability coverage including pregnancy (millions of workers)
Manufacturing	52	17.78	10.24
Construction	7	2.39	1.37
Transportation	6	2.05	1.18
Communications and public utilities	6	2.05	1.18
Wholesale and retail trade	12	4.10	2.36
Finance	7	2.39	1.37
Services	6	2.05	1.18
Mining and agriculture	4	1.37	.79
All industries	100	[2] 34.2	[2] 19.7

[1] Percentages are based on calculations in Daniel N. Price, "Private Industry Health Insurance Plans: Type of Administration and Insurer in 1974" Social Security Bulletin, March 1977, p. 17, table 3. The percentages are based on health care plans. It is assumed that coverage for temporary disability plans parallels that of health plans to a large degree.

[2] Totals are taken from table 1, lines (4) and (5).

TABLE 3.—WOMEN COVERED BY TEMPORARY DISABILITY INSURANCE BY INDUSTRY

Industry	Percent female employment by industry [1]	Temporary disability coverage (millions of women) [2]	Temporary disability coverage including pregnancy (millions of women) [3]
Manufacturing	29.3	5.21	3.00
Construction	6.6	.16	.09
Transportation	17.1	.35	.20
Communications and public utilities	29.3	.60	.35
Wholesale and retail trade	43.7	1.79	1.03
Finance	52.5	1.25	.72
Services	55.9	1.15	.66
Mining and agriculture	16.0	.22	.13
All industries	31.4	10.74	6.19

[1] U.S. Department of Labor, Employment and Earnings March 1977, vol. 24, No. 3, p. 9, table 2 "Employed Persons in Selected Industries."

[2] TDI coverage is calculated by multiplying percentage of female employment by industry, times total temporary disability insurance coverage, by industry (see table 2).

[3] TDI coverage including pregnancy is calculated by multiplying percentage of female employment by industry times TDI coverage including pregnancy by industry (see table 2).

TABLE 4.—EXPECTED BIRTHS BY INDUSTRY

[Based on the 1975 birth rate of 66.7 births per 1,000 women 15-44 years of age][1]

Industry	Births for women covered by temporary disability insurance (thousands)[2]	Births for women covered by temporary disability insurance including pregnancy (thousands)
Manufacturing	239	138
Construction	7	
Transportation	16	9
Communications and public utilities	27	16
Wholesale and retail trade	82	47
Finance	57	33
Services	53	30
Mining and agriculture	10	6
All industries	491	283
Additional births not now covered by temporary disability insurance for pregnancy equals		208

[1] U.S. Department of Health Education and Welfare, National Center for Health Statistics, Monthly Vital Statistics Report, Dec. 30, 1976 (supplement), vol. 25, No. 10. The 1976 rate is still preliminary.

[2] Births are calculated by multiplying the number of women under 45 years of age covered by temporary disability insurance times the 1975 birth rate. It is assumed that 68.48 percent of women workers are under 45 based on calculations from U.S. Department of Labor, Bureau of Labor Statistics, Office of Current Employment Analysis, unpublished data from the May 1976 Current Population Survey.

[3] Births are calculated by multiplying the number of women under 45 years of age covered by TDI including pregnancy benefits times the 1975 birth rate.

TABLE 5.—COST OF CURRENT PREGNANCY DISABILITY INSURANCE COVERAGE (AT AVERAGE 6 WEEKS) FOR WAGE REPLACEMENT OF 60% BY INDUSTRY

Industry	Births for women covered by temporary disability insurance including pregnancy (thousands)	Average weekly earnings for women[1]	Cost of current disability insurance coverage for pregnancy (millions)[3]
Manufacturing	138	135	67.1
Construction	4	140	2.1
Transportation	9	161	5.2
Communications and Public utilities	16	191	11.0
Wholesale and retail trade	47	94	15.9
Finance	33	140	16.6
Services	30	[2] 143	15.4
Mining and agriculture	6	148	3.2
All industries	283	[3] 134	136.5

Total cost for current disability including an increase of 20 percent for administrative costs[4] = $163.8.

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[1] U.S. Department of Labor, Bureau of Labor Statistics, Office of Current Employment Analysis. Unpublished data from the May 1976 current population survey. Includes both full-time and part time workers.

[2] Excludes private household workers.

[3] Average.

[4] Administrative costs are based on the average difference between benefits and contributions for temporary disability plans over a 5-year period. Data from Alfred M. Skolnik, "Twenty-five Years of Employee Benefit Plans," Social Security Bulletin, September 1976. This figure represents the amount that plans are currently paying for pregnancy coverage, without any Federal requirement.

Note: The cost column equals (births) times (weekly earnings) times (60 percent replacement rate) times (6.2 weeks).

TABLE 6.—TOTAL COSTS IF TEMPORARY DISABILITY INSURANCE WERE EXTENDED TO COVER PREGNANCY FOR ALL COVERED WORKERS (WAGE REPLACEMENT AT 60 PERCENT)

Industry	Births for women covered by temporary disability insurance (thousands)	Average weekly earnings for women [1]	Costs for coverage for 6 weeks (millions) [2]	Costs for coverage for 7.5 weeks (millions)	Costs for coverage for 9 weeks [2]
Manufacturing	239	135	116.2	145.2	174.2
Construction	7	149	3.8	4.7	5.6
Transportation	16	161	9.3	11.6	13.9
Communications and public utilities	27	191	18.6	23.2	27.8
Wholesale and retail trade	82	94	27.7	34.7	41.6
Finance	57	140	28.7	35.9	43.1
Services	53	[3] 143	27.3	34.1	40.9
Mining and agriculture	10	148	5.3	6.7	8.0
All industries	491	[4] 134	236.0	296.1	355.3
Total cost for current disability including an increase of 20 percent for administrative costs [5] equals			284.3	355.3	426.3

[1] U.S. Departmet of Labor, Bureau of Labor Statistics, unpublished data from the May 1976 Current Population Survey. Includes both full-time and part-time workers.

[2] The cost columns equal (births) times (weekly earnings) times (60 percent replacement rate) times (weeks of disability).

[3] Excludes private household workers.

[4] Average.

[5] Administrative costs are based on the average difference between benefits and contributions for temporary disability plans over a 5-year period. Data from Alfred M. Skolnik, "Twenty-five Years of Employee Benefit Plans," Social Security Bulletin, September 1976. This includes the $225,500,000 already being incurred by plans now covering pregnancy for an overall average of 6.2 weeks.

TABLE 7.—TOTAL ESTIMATED PAYROLL FOR WORKERS COVERED BY TEMPORARY DISABILITY INSURANCE

Industry	Temporary disability coverage (millions of workers) [1]	Average weekly earnings [2]	Weekly payroll for workers covered by TDI (millions)
Manufacturing	17.78	211	3,751.6
Construction	2.39	246	587.9
Transportation	2.05	247	506.4
Communications and public utilities	2.05	247	506.4
Wholesale and retail trade	4.10	147	602.7
Finance	2.39	202	482.8
Services	2.05	[3] 173	354.7
Mining and agriculture	1.37	187	256.2
All industries	34.2	[4] 206	7,048.7
Total annual payroll (weekly payroll times 52) equals $366,523.4 million.			

[1] See table 2.

[2] U.S. Department of Labor, Bureau of Labor Statistics, Office of Current Employment Analysis, unpublished data from the May 1976 Current Population Survey, includes both full-time and part-time men and women.

[3] Excludes private household workers.

[4] Average.

TABLE 8.—ADDITIONAL COST OF EXTENDING TEMPORARY DISABILITY INSURANCE BENEFITS FOR PREGNANCY (FOR AVERAGE PERIODS OF 6.0, 7.5, AND 9.0 WEEKS)

[Dollar amounts in millions]

Weeks of benefits	Excluding administrative cost	Including administrative costs
6.0	$100.4	$120.5
7.5	159.6	191.5
9.0	218.8	262.5
As a percent of estimated payroll:		
6.0	.027	.033
7.5	.044	.072
9.0	.060	.072
Cost per worker (14,500,000 additional workers): 6.0:		
Per year	$6.92	$8.31
Per week	.13	.16
Additional cost for all 34,200,000 workers for coverage above 6.0 weeks):		
7.5:		
Per year	1.73	2.08
Per week	.03	.04
9.0:		
Per year	3.46	4.15
Per week	.07	.08

[1] These figures represent the difference between coverage costs (all industries) (table 6) and current coverage cost (all industries) (table 5).

[2] These figures represent the difference between total costs including administrative costs (table 6) and total costs for current pregnancy disability including administrative costs (table 5).

TABLE 9.—TEMPORARY DISABILITY INSURANCE CONTRIBUTIONS (EMPLOYER AND EMPLOYEE)

	Millions
(1) Contributions to private industry temporary disability insurance plans in 1974 [1]	$4,250.1
(2) Total contributions for workers covered by TDI in 1976 (1974 dollars—34,200,000 workers) [2]	4,585.3
(3) Total contributions for workers covered by TDI in 1976 adjusted by the Consumer Price Index to represent dollars in 1976	5,292.8

Additional Costs as a Percentage of Total TDI Contribution Required [3]

[In percent]

Weeks of benefits	Excluding administrative costs [4]	Including administrative costs [4]
6.0	1.9	2.2
7.5	2.9	3.5
9.0	4.0	4.7

[1] Alfred M. Skolnik, "Twenty-five Years of Employee Benefit Plans," Social Security Bulletin, September 1976.

[2] This figure is derived by calculating private industry contributions per worker in 1974 ($137.07) and multiplying that by the amount of private coverage in 1976. See table 1 for coverage.

[3] The percentages reflected in this table represent the additional costs (table 8) divided by the sum of total contributions (Table 9) plus the additional costs (table 8).

[4] See table 5, footnote 4 for the explanation of the administrative cost differential.

Ms. HERMAN. I will be happy to do that.

I must, however, concur with my colleague from the Justice Department that cost should not be a deterring factor in the passage of this legislation, when we consider the costs that women workers must absorb as a result of discriminatory policies and practices.

In conclusion, the denial of equal employment rights constitutes a serious setback for women in their efforts to better themselves, to support their family, and to become full, active, and productive participants in our society.

They look to the Congress to correct this situation. In this regard, I ask you to note the wide diversity of women's and other groups who have joined together to support the legislation.

The Department of Labor is fully committed to the principle of equal employment opportunities for women. We will work with this subcommittee and the Congress to effectuate this end. You may feel free to call upon us for whatever assistance we might be able to provide you.

We fully endorse H.R. 5055, and we thank you for this opportunity.

Mr. HAWKINS. Thank you.

We wish to commend the witnesses for their brevity, and also for their very excellent statements.

Mr. Weiss, do you have any questions?

Mr. WEISS. Thank you, Mr. Chairman.

I am not sure that I had any better luck understanding the thrust of the witness who testified on the last panel than Mr. Sarasin, but what he was saying, I think, was, or at least as I perceived it, was that the amendment that we are talking about seems to be directed toward pregnant workers, and his concern seemed to be directed toward the wives of male workers, the pregnant wives of male workers.

In your statement, Commissioner, on page 3, I think you allude to that particular area. I wonder what the work experience of the Commission has been in relation to that fringe benefit area, that is, the area of health insurance policies, and so on.

Commissioner WALSH. Let me tell you what we have found.

In the early days of the Commission, very often a company that supplied benefits, supplied those benefits to the male employees if their nonworking wives became pregnant, for example, hospitalization benefits.

Those same benefits very often were not supplied to the female employees. Consequently, if a male and a female work for the same company, the male employee, in effect, got maternity benefit coverage for his wife, but the female employee would not get that benefit. That is what we allude to. I think, perhaps, that this is what was alluded to in the previous panel.

Obviously, under title VII and under our decisions, and under our guideline, we would find this discriminatory.

Mr. WEISS. All right. Taking this one step further, whether we will or will not be faced with it, in your opinion, or in the opinion of the Attorney General, would the amendment that we are talking about address itself or provide pregnancy benefits for the wife of the worker?

Commissioner WALSH. I am not trying to interpret section II of the bill, which just came through. However, it is our position from the Equal Employment Opportunity Commission's position, that benefits must be equal.

In other words, any benefit given to a male employee must be given to a female employee. Pregnancy on the part of the female employee must be treated as a temporary physical disability just as a broken leg.

Mr. DAYS. The bill is to equalize opportunities for employees. It is to make certain that they are not disadvantaged in the work force by certain descriminations with respect to disabilities. I don't understand that you reach dependents and whatever coverage there might be of dependents under plans.

Mr. **Weiss.** As I got the thrust of the oral testimony today, and in fact it was my impression that the employer was to cover the dependents of the employees. I wanted to be sure that that, in fact, was disposed of, and that later on we are not subjected to an attack on the legislation because of some lack of clarity as to what we are talking about.

Thank you very much.

Mr. **Hawkins.** Thank you, Mr. Weiss.

Mr. Sarasin.

Mr. **Sarasin.** Thank you, Mr. Chairman.

Just to pick up on Mr. Weiss's comment, I think that this is the correct interpretation of the witness's statement earlier. I don't see how you can read the bill any other way.

Why aren't we saying, under the language of this bill, that whatever you provide your female employee by way of fringe benefits, that also must be provided to all employee by way of fringe benefits, including the wives of employees, and that would include disability benefits also. That is what it says.

Ms. **Jenkins.** For purposes of title VII, the definition that H.R. 5055 puts into and that is included in the amendment would only apply to benefits for employees of the employer.

Now, it may be that the employer may choose to provide maternity benefits for the dependents. If he does so, then he must provide maternity benefits for dependents across the board. Of course, a female employee would not have a dependent husband who would be eligible for the benefit. So you would not have a problem there.

In terms of the amendment, what it is saying for title VII purposes, is if maternity benefits are being provided, they must be available across the board.

Mr. **Sarasin.** The point made earlier was that some companies would provide maternity benefits in the way of medical costs to the wives of employees, and not to the female employees. Fine, I don't have any problem with that.

The tack of this legislation is to say that you are not only going to provide for cost of medical care, but you are going to provide a disability benefit on the basis of pregnancy. I don't see how you can read this any other way than to say that that has to be uniform throughout the plan, and you are mandating it in the plan. So if it is going to be available for the female employees, it is going to be available for the wives of male employees.

I don't think that this is the intent, but I don't see how you can read it any other way.

Ms. **Clauss.** The disability plans usually do not provide for the disability of the spouse of the worker, when she or he is disabled on the job.

Mr. **Sarasin.** That may be the qualifying aspect, but I am not sure that the language of the bill gets to that.

Ms. **Clauss.** You are talking about equal treatment. So, in fact, if the disability plan is limited to employees, then in providing for pregnancy related disability, that too would be limited to employees.

If the disability plan should be so unique that it would apply to a disability of the spouse who is not an employee, then the example given by the prior witness will come into play.

Mr. **Sarasin.** I think that is correct.

Let me express a concern that there seems to be a lack of concern for the cost of the program. Mr. Days, you point out in your statement, on page 8, that there are many employers who are already complying with the proposed legislation and did so prior to *Gilbert*. Would you name one?

Mr. **Days**. Right off the top of my head, I cannot name one.

Mr. **Sarasin**. Some provide for a type of payment, or a wage replacement to a female employee on maternity leave. Most of them have been narrow in their application, such as a 6-week period or something like that.

All of them, as I understand it, treat maternity leave and disability payments as a separate little item. When we apply this bill, we are saying: if you provide 26 weeks of unemployment and 26 weeks of disability payments to your employees, that person out on maternity leave is entitled to 26 weeks of disability payments. There is no other way to read it. There is no company that does that.

Mr. **Days**. There are two responses. I know the name of one employer. I happen to be the chairman of the board of a child welfare agency which has changed its disability program to conform with the law prior to *Gilbert*. I am aware that there are other agencies that are moving in that direction.

I think that it is a fair comment to say that many agencies and employers have been informed by their attorney and by people who are familiar in this area that they would have to start conforming their plan. I would presume that had *Gilbert* not come along, we would see a number of companies that had figured out a way to address this particular problem.

Mr. **Sarasin**. I am not arguing that some companies are providing a wage replacement program for their employees on maternity leave, but it is not the same payment or the same duration as might be available for disability.

Mr. **Days**. We can submit a list of those employers who were attempting to conform.

[List referred to above follows:]

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United States Department of Justice
WASHINGTON, D.C. 20530

ASSISTANT ATTORNEY GENERAL

The Honorable Augustus F. Hawkins
Chairman
Committee on Education and Labor,
Subcommittee on Employment Opportunities
United States House of Representatives
13346A Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hawkins:

When I testified before your Subcommittee regarding H.R. 5055 I indicated that I would provide to you a list of employers which presently treat disabilities related to pregnancy like other temporary medical disabilities. Of course the most prominent example of such an employer is the Federal Government, which permits employees to use accrued sick leave for all disabilities including pregnancy, childbirth and pregnancy related medical conditions. I have enclosed a copy of an appendix in the Supreme Court Brief for Martha V. Gilbert, et al. in General Electric Co. v. Gilbert, which lists leading firms which pay temporary disability benefits for disabilities arising out of pregnancy. I hope that this list is useful to the Subcommittee.

I understand that there was testimony before the Subcommittee regarding the consideration of a suggestion to amend H.R. 5055 so that it would prohibit an employer from decreasing benefits available to employees in an effort to comply with the new amendment. In the event that there is any confusion regarding the scope of my testimony, I thought that I should make clear that I was addressing H.R. 5055 as it was submitted to the Subcommittee and not the suggested amendment thereto.

If I may be of any further assistance, please contact me.

Sincerely,

Drew S. Days III

Drew S. Days, III
Assistant Attorney General
Civil Rights Division

APPENDIX A

Plans of "Leading Firms in a Variety of Industries" [1] Which Pay Temporary Disability Benefits for Disabilities Arising Out of Pregnancy

Source: U.S. Department of Labor, Bureau of Labor Statistics, "Digest of One-hundred Selected Health and Insurance Plans Under Collective Bargaining, 1954," Bulletin No. 1180 (June 1955); U.S. Department of Labor, Bureau of Labor Statistics, "Digest of Health and Insurance Plans" 1971 Edition (GPO 1972), Vol. II, and 1974 Edition (GPO 1975) Vol. II.

Name of Company	Digest of 100 Selected Health & Insurance Plans, 1954 [2]		Digest of Health & Insurance Plans, 1971 Edition, Volume II		Digest of Health & Insurance Plans, 1974 Edition, Volume II	
	Weeks	Page	Weeks	Page	Weeks	Page
Alum. Co. of Amer.	6	91	6	1	6	1
Amer. Can.	6	103	6	7	6	7
Amer. Seating	6	43	26	9	26	9
Amer. Standard	not listed		6	11	6	11
Amer. Sugar	6	7	not listed		not listed	
Amer. Viscose	6	67	not listed		not listed	
Amstar Corp.	6	19	6	15	6	15
Armour & Co.	6	19	8	17	8	17
Armstrong Cork	6	25	6	19	6	19
Assn. Master Painters	13	163	not listed		not listed	
Beth. Steel	6	97	6	21	6	21
Borden, Inc.	not listed		6	23	6	23
Brewers' Bd. of Trade	not listed		none		26	25
Campbell Soup	4	7	8	31	8	33
Caterpillar	6	115	6	35	6	37
Chase Brass & Copper	none	91	6	41	6	43
Chicago Lithographers	6	61	not listed		not listed	
Cluett Peabody	not listed		6	49	6	51
Colt's Mfg. Co.	6	7	not listed		not listed	
Cone Mills	6	25	6	53	6	55
Construction Ind.	not listed		13	61	13	63
Continental Can.	6	109	6	63	6	65
Crown Fellerbach	not listed		6	67	6	67
Deere & Co.	6	109	6	69	6	71
Distillery Ind.	not listed		6	73	6	75
Dow Chemical	6	61	6	79	6	79
E. I. duPont	not listed		6	97	6	85
Firestone	6	79	6	87	52	93
F.N.I.C. Corp.	not listed		not listed		6	95
Ford	6	127	6	97	6	99
Furniture Industry	6	43 [3]	6	101	6	103

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Name of Company	Digest of 100 Selected Health & Insurance Plans, 1951[3]		Digest of Health & Insurance Plans, 1971 Edition, Volume II		Digest of Health & Insurance Plans, 1974 Edition, Volume II	
	Weeks	Page	Weeks	Page	Weeks	Page
GM	6	127	6	111	6	113
B F Goodrich	6	73	6	117	6	119
Greyhound	not listed		6	122	6	124
Hotel Assn. of NYC	?		6	125	6	125
Florsheim Shoe	6	79	6	135[4]	6	139[5]
IBM	not listed		52	143	52	143
Int'l Harvester		115[11]	6	141	6	146
Int'l Paper	6	49	6	147	6	151
Jewerly Mftrs.	6	145[6]	6	151	6	155
Johnson & Johnson	6	145	8	153	8	157
Kennecott Copper	6	151	6	155	6	159
Kroehler Mfg.	not listed		6	159	6	163[7]
LTV Aerospace	not listed		6	167	52	171
Luggage & Leather Ind.[3]	6	85	6	171	6	173
Maritime Ind.[3]	none	175[4]	6	177	6	179
Mass. Leather Mfrs. Assn.	6	85	6	181	6	183
Metalworking & Repair Services	not listed		6	187	6	189
Nabisco	6	7[8]	6	201	6	203
Nat'l Auto Transporters Assn.	6	169	6	203	not listed	
Nat'l Steel	not listed		6	205	6	205
NY Shipping Assn.	not listed		6	207	6	207
N. Amer. Rockwell	not listed		6	211	6	211
Northwest Forest Products Assn.	not listed		6	215	6	211
Owens-Ill.	8	91	6	217	6	213
Pacific Maritime Assn.	not listed		6	221	6	221
PPG Industries	not listed		6	233	6	229
Printing Industry Lithographers	not listed		6	239	26	239
Publishers Assn. of NYC	none	61	none	243	26	239
Pullman	6	133[9]	6	245	6	241
RCA	none	121	8	251[7]	8	251[7]
Retail Trade Ind.	not listed		20	257	20	257
Retail Drug Ind.	not listed		not listed		6	83
Retail, Wholesale & Warehouse Inc.	not listed		6	247	6	253
Rockwell Int'l. Corp.	not listed		not listed		6	255

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Name of Company	Digest of 100 Selected Health & Insurance Plans, 1954[2]		Digest of Health & Insurance Plans, 1971 Edition, Volume II		Digest of Health & Insurance Plans, 1974 Edition, Volume II	
	Weeks	Page	Weeks	Page	Weeks	Page
Sperry Rand	6	138[10]	6	265	6	263
Swift & Co.		18[12]	8	277	8	273
Trucking Industry Central States	6	169	6	283	6	279
Trucking. Warehousing & Ind. W'ern States	not listed		none		6	281
TRW, Inc.	not listed		6	275	6	283
Uniroyal	not listed		6	291	6	287
United Air Lines	not listed		6	293	6	289
U S Steel	6	103	6	297	6	291
Upholstering & Allied Trades[3]	6	49	6	303	6	289
Westvaco	not listed		6	307	6	303
Wyandotte Worsted Co.	not listed		6	311	6	307

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[1] The preface to U.S. Department of Labor, Bureau of Labor Statistics, Digest of Health and Insurance Plans, 1974 Edition, Vol. I (GPO 1975), p. iii states: "This two-volume digest, a continuation of a series begun in 1955, summarizes the principal features of selected health and insurance plans for office and nonoffice employees in the private sector of the economy. * * * The two volumes in combination present a picture of the health and insurance programs available to employees of leading firms in a variety of industries."

[2] Listing in this publication taken from column in each plan description headed "Maternity Provisions", "Accident & Sickness" sub-column. In all cases the number of weeks refers to the maximum number of weeks for which regular benefits were provided for maternity. All plans listed in columns 2 and 3 were in effect in 1954. Preface to 1954 Bulletins at iii.

[3] Various employers.

[4] There were three listings—one for each of three Florsheim units.

[5] Called "Interco Inc., The Florsheim Shoe Co."

[6] "Jewelry Industry, Assoc. Jewelers, Inc., Jewelry Crafts Assoc., & other employers."

[7] For non union salaried employees.

[8] Called "National Biscuit Co."

[9] Called "Pullman-Standard Car Mfg. Co."

[10] Called "Sperry Gyroscope Co."

[11] No number of weeks, paid in lump sum of $50.00.

[12] Covered by paid sick leave plan.

Mr. Days. The second comment that I would like to make——

Mr. Hawkins. Before moving on to that, may I just clear up the record, if Mr. Sarasin will yield. I would like to indicate that it came to the knowledge of the committee that there were some companies already providing pregnancy disability at various periods of time: IBM, Xerox, and Polaroid. I think that these are three companies that indicated that they were doing it.

I think that in the case of IBM it is 100 percent for 1 year; Xerox for 5 months, and so on.

We have requested a submission from those companies of their plan, and in addition we will include their plan, for the record. It may be that they are not as liberal as they sound. I am not suggesting that. I am saying that, at this point in the record, without objection, when we do get the information, we would like to insert it in the record, so that the committee may have an opportunity to examine those companies' plans that are in operation. I thought that it was relevant to this point.

[Material to be furnished follows:]

April 25, 1977.

Mr. Leslie D. Simon,
Director of Public Affairs,
International Business Machines Corp.,
Washington, D.C.

Dear Mr. Simon: This letter is in reference to the Subcommittee's request for information on IBM's practices with respect to pregnancy-related disability under its sick leave and disability benefit plans. The information provided in your letter of April 7 was certainly helpful to the Subcommittee. However, it would be particularly useful to our consideration of this matter if you could provide us with the following information:

(1) the average length of disability for employees taking pregnancy disability leave;
(2) the rate of return for these employees;
(3) increased cost due to expanded coverage of pregnancy-related disability, and
(4) the coverage extended to spouses of employees.

We would greatly appreciate receiving this material as soon as possible so that it may be incorporated into the hearing record of April 5 and available to the Committee as we continue our consideration of this issue.

With best wishes, I am
Sincerely,

Augustus F. Hawkins,
Chairman.

International Business Machines Corp.,
Washington, D.C., April 7, 1977.

Ms. Susan Grayson,
Staff Director, Subcommittee on Employment Opportunities, Committee on Education and Labor, U.S. House of Representatives, Washington, D.C.

Dear Ms. Grayson: You requested information regarding IBM's practices with regard to pregnancy-related disabilities in connection with congressional hearings on this subject.

The IBM Sickness and Accident Income Plan provides a benefit equal to the employee's full regular salary beginning with the first day of absence due to disability and continuing for up to 12 months.

On April 17, 1972, the IBM Sickness and Accident Income Plan was amended so that absences due to pregnancy-related disability are now covered for benefits under the plan in the same manner as any other disability. Coverage continues until the employee has recovered from the disability caused by her pregnancy.

Some employees, who are not disabled, may wish to take a maternity leave of absence prior to becoming disabled. For those who apply, maternity leaves will be granted without pay. However, benefits equivalent to those under the IBM Sickness and Accident Income Plan will be provided from the date of admission to a hospital until recovery from the disability caused by the pregnancy.

For your further information, as of February 28, 1977, the total domestic population of IBM was 161,817. Of this total, $28,680 or 17.7 percent are women. Women are found in all categories of jobs, such as management, professional, sales, technicians, office-clerical, operatives and service.

I hope this information is helpful to you.

Sincerely,

LESLIE D. SIMON,
Director of Public Affairs.

INTERNATIONAL BUSINESS MACHINES CORP.,
Washington, D.C., May 2, 1977.

Chairman AUGUSTUS F. HAWKINS,
Subcommittee on Employment Opportunities, Rayburn House Office Building, Washington, D.C.

DEAR CHAIRMAN HAWKINS: Thank you for your letter of April 25. I'm glad that the information we provided you on April 7 regarding pregnancy-related disability was helpful to the Subcommittee.

We have also done our best to answer the four additional questions you asked. The basic difficulty in answering them is that we don't retain that data needed in any retrievable form, so that it is difficult to give a precise answer.

However, with regard to questions (1) and (2), we did do a study of a sample of IBM's population—in a few of our plants—in 1975, and we can give you some data based on this sample:

(1) Based on the sample, the average length of disability for employees taking pregnancy disability leave was 8.2 weeks. However, this figure may not reflect the total time taken, since it does not include intermittent absences prior to the period of continuous absence.

(2) Based on the sample, the rate of return for these employees was 74 percent.

(3) We cannot determine the increased cost due to expanded coverage of pregnancy-related disability, since we do not collect data related to the salaries of the woman taking pregnancy disability leave.

(4) Spouses of employees receive normal IBM medical expense benefits for pregnancy under our family hospitalization, surgical, and major medical plans. They do not, of course, receive any IBM pay for time unless they also happen to be employees.

I hope this additional information is useful to the Subcommittee.

Sincerely yours,

LESLIE D. SIMON,
Director of Public Affairs.

POLAROID CORP.,
Cambridge, Mass., May 4, 1977.

Congressman AUGUSTUS F. HAWKINS,
House of Representatives, Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN HAWKINS: We are very happy to share with the Subcommittee our experience since the installation of our Short Term Disability Program in 1973 which includes benefits for the disability which occurs as a result of a pregnancy. The data you requested follows:

Polaroid's Short Term Disability Plan is a pay continuation plan. Every employee with at least one year's seniority is covered for up to one year's absence for each disability (a physical condition preventing him/her from doing any work); an employee with under one year of service is covered for up to 65 days of absence depending on the length of employment.

Absences of over five consecutive days require a Physician's Statement. Payment is made only with the agreement of the Polaroid Medical Director. The Medical Director determines the appropriate length of absence for each disability based on recognized guidelines, the contents of the Physician's Statement and the Director's judgment. Absence of under five consecutive days are paid at the discretion of the supervisor.

Presently the Plan covers almost 11,000 employees of which 3,300 are women. Included are employees in managerial, administrative, clerical, technical and semi-skilled occupations.

The average length of absence for employees with pregnancy related disabilities is nine weeks, the cost to Polaroid in 1976 was approximately $130,000. About 80% of employees on a pregnancy related disability returned to their jobs.

Spouses of employees are eligible for maternity health care benefits but have no disability coverage unless they also work for Polaroid.

I hope this information will be of assistance to your committee.

Sincerely,

E. G. GUILMARTIN,
Senior Manager.

Mr. SARASIN. I think that it would be, Mr. Chairman. We want to see if there is any distinction between the handling of maternity leave payment and regular disability payments under those plans.

Mr. DAYS. May I comment to another part of your question?

Wouldn't it be necessary to allow women 26 weeks for pregnancy related disability? My response would be that the benefit would be the same, but it would be available to employers to conduct whatever type of studies were necessary to determine what was a reasonable period of time given certain types of disabilities.

One year I worked for General Motors on an accident and sickness plan, and certainly General Motors had a very effective way of determining which workers were malingering and which workers were disabled. It seems to me that the same types of safeguards can be included in any amendments for pregnancy disability to make certain that there is no abuse.

There may be situations related to pregnancy, for example, in the *Gilbert* case itself, I believe, there was a problem with an embolism. It was not directly related to pregnancy, but it occurred during the leave for pregnancy purposes. That constituted a very serious disability, and it was not covered under the plan.

So, I think that the outer limits should be the same, but many safeguards can be included in such plans.

Mr. SARASIN. I don't see how you could add the safeguards. I would guess that some company would have some idea of how long you should be out of work for an appendectomy, or something like that. If you are out a little bit longer, they get nervous and ask you to go and be examined by a physician. I am not sure that you will have this opportunity in this situation.

Can you say, "It seems to me that after 4 or 6 weeks an individual should be back at work." You can be examined. If you are not disabled, I don't care what the situation is at home, or if anybody is there to take care of the child, you will go back to work and face the loss of this payment.

Mr. DAYS. This is not a child care bill. At some later stage, if Congress sees, in its wisdom, that it should address this issue, that would be fine.

This legislation is to deal with physical disability, and not to deal with any of the very valid problems that are associated with child care for both men and women.

Mr. HAWKINS. May I interrupt, Mr. Sarasin?

We do have a problem. The bells indicate that we must go to the floor. If there is further questioning of the witnesses, I would suggest that we recess the hearing for 5 minutes, and resume with Mr. Sarasin.

Mr. Sarasin. I have no further questions.

Mr. Hawkins. I do not want to keep the witnesses waiting. However, we have one other witness, so we will resume as soon as possible, but in view of the fact that we do have the urgent call to the floor, may I thank the witnesses on this panel for their testimony this morning, and dismiss the witnesses who have appeared.

The subcommittee will take a 5 minute recess, and resume just as quickly as we can.

[Recess.]

Mr. Hawkins. The subcommittee will be in order.

Our last witness for the day will be Mr. Clarence Mitchell, director of the Washington bureau of the National Association for the Advancement of Colored People, and chairman of the Leadership Conference on Civil Rights.

Mr. Mitchell is no stranger to this subcommittee. He is a personal friend, and he has certainly worked diligently, more diligently, I suppose, than any other individual on Capitol Hill.

Clarence, it is a pleasure to welcome you before the committee, and I hope that you will introduce your associate at the table with you.

STATEMENT OF CLARENCE MITCHELL, DIRECTOR, WASHINGTON BUREAU OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. Mitchell. The associate with me is Ruth Weyand, who is counsel in the *Gilbert* case, who not only is a long-time friend over the years, but who has been a great source of assistance to us in civil rights matters not related to this particular question.

I asked her to sit with me because I was listening to the colloquy between Mr. Sarasin and the Justice Department and the EEOC people, and I thought that it might be nice to have an expert around in case of some technical actuarial matter arising on which I could not give a proper reply.

My statement, Mr. Chairman, is one page. Since I tend to talk longer when I do it extemporaneously, maybe I had better read it, if it is all right with you.

Mr. Hawkins. You may proceed to deal with it as you so desire.

Mr. Mitchell. I am Clarence Mitchell, director of the Washington bureau of the National Association for the Advancement of Colored People, and chairman of the Leadership Conference on Civil Rights, which as members of the committee know is an organization that is made up of approximately 132 civil right and labor organization which for 28 years has been working to try to move the ball forward in the area of civil rights.

I thank you for this opportunity to testify in support of H.R. 5055, a bill to prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions.

Those of us who have supported equal employment legislation from its earliest beginnings believe that the Supreme Court majority was in error when it decided *General Electric* versus *Gilbert*. H.R. 5055 will correct what is clearly unjust discrimination based on sex in the granting of benefits under employee disability plans.

We will not burden the record with testimony that duplicates what has already been given or will be given by those who have spent much time and effort in assembling the facts. We do urge that H.R. 5055 be passed quickly and that it be kept free from damaging amendments.

As members of the subcommittee know, there are other plans for amending title VII of the 1964 Civil Rights Act. However, we are strongly opposed to mixing any other revisions of the law with H.R. 5055.

We hope to get and are working for joint administration, congressional, and public interest support for strengthening amendments to title VII in a package wholly apart from the question dealt with in H.R. 5055.

This completes my testimony.

Mr. HAWKINS. Thank you, Mr. Mitchell.

Ms. Weyand, do you care to supplement that statement in any way?

STATEMENT OF RUTH WEYAND, ASSOCIATE GENERAL COUNSEL, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AND COUNSEL IN THE GILBERT CASE

Ms. WEYAND. I did wish to clear up one matter that was raised in the questioning earlier of people who appeared for the Chamber of Commerce. There was a statement that all of the State acts did make a limitation that treated pregnancy in some regard from other disabilities.

Hawaii makes no distinction whatsoever. Hawaii has a law which requires all employers who operate in the State of Hawaii to provide income maintenance during disability. This law was amended in 1973, effective May 1973, to treat disabilities arising from pregnancy the same as other disabilities.

In connection with preparing my case for the Supreme Court, I wrote the administrator of the Hawaiian temporary income maintenance law and asked what the experience had been. He sent me a list of the six insurance companies which provided some 85 percent of the coverage in Hawaii. He sent me a table which showed the rates these insurance companies charged before the amendment went in effect, and the rates they charged after.

I wrote to the companies, and everyone of them replied that they had not raised rates because of the placing of maternity coverage under it. The table shows, and we will file this, with your permission, as a supplemental statement, that the Pacific Insurance Co. had a rate of $1.42 cents per $100 of taxable wages in 1973, before the pregnancy inclusion law went in effect in May 1973. For 1975, their charge is 64 cents, that is the composite for male and female.

They broke it down as to the male and female employee rates in 1973, and the charge per $100 in taxable wages of Pacific Insurance was $1.71 for females. For females in 1975, it was 67 cents. They wrote me that they had overestimated their rates.

I will not go through the rates, but every one of these companies said that they did not raise the rate because of the coverage of pregnancy-related disabilities. Most of them lowered their rates very substantially because they had overestimated.

We will also provide you with a publication called Transactions of the Society of Actuaries which shows that the actuaries in the insurance industry are still using tables that they prepared in 1949 and 1950, and did not take into consideration the lowered birth rates.

The 1976 publication shows that the ratio of expected claims under the 6-week maternity to the actual claims was as low as 40 percent. As to claims outside of the maternity, outside of the 6-weeks, it was running 100 percent. The tables are in there, and the tables show that the ratios of actual claims for maternity benefits went as low as 27 percent.

I am associate counsel with the IUE, and we effectuated 50 contracts providing the maintenance of income for disabilities on the same basis without any distinction as to whether it arises from pregnancy or from any other cause. We do get insurance rates quoted quite differently by different insurance carriers.

A number of the employers have found that it is cheaper to self-insure, because of the high insurance rates quoted on the basis of these 1949 tables which have not been revised and which the Insurance Society of Actuaries transactions for 1976 says have not been revised, and the ratios of actual claims to expected claims are running 40 percent.

The insurance companies quoted as such high rates that a number of those companies said:

> We can become self-insured as to the pregnancy, because we just know that it is not going to be as costly as the insurance rates quoted for us today the cost of all the women who are going to be out during the time that they are having babies, and if we self-insure it is not going to affect our insurance rates.

In fact, I am on the equal employment opportunity commission of the American Bar Association, and one of the members of that committee, an attorney for one of the insurance companies, told me that because of the problem with the insurance companies, the insurance companies were now providing what they call "administrative services" to employers where the employer does not insure the risk, but the claim goes to the insurance company as if it were insured.

He gave me a little booklet which I could provide you with, which outlines the administrative services provision, because their experience had changed so on maternity over the years, the table did not reflect them. They were allowing employers to become self-insurers, but the insurance companies would pay out the amounts and the company would make insurance companies pay in whole for actual cost instead of paying insurance premiums.

I just wanted to illustrate this. I will also file a statement that will answer those questions which were raised.

Mr. Hawkins. Without objection, the statement when presented will be entered in the record at this point.

[Statement to be furnished follows:]

STATEMENT OF RUTH WEYAND, ASSOCIATE GENERAL COUNSEL, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

I am Associate General Counsel of the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, usually called IUE, and have held this position for the past eleven years. A third of the approximately 300,000 employees represented by the IUE are women. As associate general counsel for IUE, I have represented the union and its members in attempts to end discrimination because of pregnancy in negotiations with major employers, including General Motors, General Electric, Westinghouse, Philco-Ford and Allis Chalmers. I have also handled grievances, arbitrations, administrative agency proceedings before both EEOC and state fair employment practice agencies and suits in court alleging discrimination because of pregnancy. As attorney for the IUE, I prepared and filed amicus briefs in support of the female discriminatees in the following cases involving pregnancy: Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974), in which the Supreme Court agreed with our position that a mandatory unpaid leave provision which required teachers to stop teaching not less than five months before expected delivery date and not return to teaching until the beginning of the next regular semester following the three months age of the child violated the due process clause of the Fourteenth Amendment; Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975) holding that failure to provide the same income maintenance during absences due to pregnancy-related disabilities as were provided for absences due to other disabilities violated Title VII; Communications Workers v. AT&T, 513 F.2d 1024 (2d Cir. 1975) same holding. I also handled the care of General Electric Co. v. Gilbert and IUE, 97 S. Ct. 401 (1976) from District Court through Supreme Court.

In connection with the foregoing tasks, I collected as much material as I could as to the experience of employers who had covered pregnancy-related disabilities on the same basis as other disabilities under temporary disability programs. I sent every state fair employment practice agency a form letter dated October 28, 1975, a copy of which is annexed hereto as Attachment A. The answers I recieved from all the states are printed in the Brief for Gilbert and IUE in the General Electric case in the Supreme Court (No. 75-1589 pp. 49a-74a. The answers I received from Hawaii showed that insurance companies vastly overestimate the cost of covering pregnancy-related disabilities. The letter of November 11, 1975 from Hawaii is annexed hereto as Attachment B. It cited Hawaii statutes which require all private employers to obtain insurance coverage providing maintenance of income at the rate of 55% of average wages for the period of any nonwork-related disability, including those caused by "pregnancy" or "termination of pregnancy" for the full period of disability up to a maximum of 26 weeks (Ch. 392, Hawaii Revised Statute; for definition of disability as including those caused by "pregnancy" or "termination of pregnancy" see Section 392-3(5)). By subsequent correspondence I received a table showing that the inclusion of pregnancy did not give rise to any longer period of average period of disability because the average period of disability in 1974, the first full year of coverage for pregnancy-related disabilities, was 5.9 weeks as compared with 6.6 weeks in 1970 and 6.2 weeks in 1972. See table annexed hereto as Attachment C.

As appears in the table annexed hereto as Attachment C, the full figures for 1975 were not then available. During her testimony before the Senate on April 29, 1977 on S. 995, Patricia K. Putman, Associate Dean for Legal and Legislative Affairs, John A. Burns School of Medicine of the University of Hawaii, supplied the full figures for 1975 (see table annexed hereto as Attachment D) which showed that with pregnancy disabilities averaged in the average duration had fallen even lower, namely, to 4.9 weeks and that men averaged more disability absences than women, with pregnancy disabilities averaged in, namely males 5.1 weeks, females 4.4 weeks.

The table showing a general lowering of insurance rates after 1973 by the companies who write 80% of insurance in Hawaii (see letter of Sigal to Watanabe dated August 26, 1976, annexed hereto as Attachment E and letter of Watanabe to Sigal dated September 1, 1976, annexed hereto as Attachment F) is annexed hereto as Attachment G. Letters from these insurance companies stating that the inclusion of pregnancy-related disability coverage had not caused them to raise rates are annexed hereto as Attachments H and I (First Insurance Company of Hawaii, Ltd), J (Pacific Guardian Insurance Co. Ltd.) and K (The Travelers).

The IUE has negotiated more than 65 agreements which provide the same income maintenance for women disabled by pregnancy as they provide for employees absent due to other disabilities. A list of 65 such agreements is annexed hereto as Attachment L.

In negotiating with employers for the purpose of bringing disability benefits for pregnancy-related disabilities up to the level of other disability benefits in both duration and amount of benefit, amount wise and time wise, we encountered a great variation between insurance companies in the amount of insurance premiums quoted for groups equal as to size, age, and percentage of females. Our experience was similar to that reported in an article by Kistler and McDonough, Paid Maternity Leave - Benefits May Justify the Cost, Labor Law Journal, December 1975, pp. 782, 792, Table 2, where insurance companies quoted increased premiums ranging from 5 to 25%.

The official publication of the Society of Actuaries, Transactions, Publication Year 1976, containing 1975 Reports of Mortality and Morbidity Experience, Group Weekly Indemnity Insurance shows that the insurance industry has not revised its tables of expected number of births since the period of 1947-1949, when the birth rate reflected the baby boom which followed World War II. The tables of expected number of claims are called tabulars. This publication, referring to the tables used by major insurance companies states that "The maternity tabulars do not reflect the substantial decline in birth rates in recent years, with the result that the actual-to-tabular ratios for maternity benefits are now down near the 40 per cent level, while the actual-to-tabular ratios for non-maternity benefits are generally near 100 percent or even higher." Table 3 - Group Weekly Indemnity Experience Groups with Less than 1,000 Employees Exposed 1970-1974 Policy Years' Experience, By Plan shows that Plans with 6 Weeks' Maternity Benefit had a ratio of actual claims on 6 weeks maternity benefits to expected claims for the year ending 1971 of 51%, 1972 of 40%, 1973 of 37% and 1974 of 42%. Table 3A, being the same table for a different group of insurance companies, showed the ratio of actual claims to expected claims for six weeks naternity for 1972 was 27%, for 1973 was 22% and for 1974 was 42%. A copy of this article is attached to this Statement as Attachment M.

The insurance industry has had virtually no experience with temporary disability benefits for pregnancy-related disabilities. Paul H. Jackson, actuary, testified in GE v.

Gilbert and IUE that "there is very little actuarial experience by reason of the fact that the group business has been restricted, the maternity claims, to a six-weeks period and disability income coverage under individual policies is normally not paid when the absence is due to pregnancy" (Record as printed in Supreme Court, Vol. 11, p. 535). Jackson's estimate made in the GE case of a $1.3 million increase in costs to provide non-discriminatory coverage for pregnancy-related disabilities — rested on the assumption that 100% of the women covered by policies with a 13 weeks maximum coverage would be absent 13 weeks, and that average duration of claims under 26 week plans, would be 23 weeks and under 52 week plans would be 30 weeks (Vol. II, pp. 549, 550; Vol. III, pp. 846-847). Actuary Alexander J. Bailie in charge of group insurance for Metropolitan Life Insurance Company prepared GE Exh. 13 which made no prediction as to how long women would be absent from pregnancy-related disabilities but showed a cost of $1 billion if the average absence was 20 weeks, $1.3 billion if the absence averaged 25 weeks and $1.6 billion if the absence averaged 30 weeks (Vo. II, p. 737). A copy of GE Exhibit 13 is annexed hereto as Attachment N. The estimate of Peter M. Thexton, associate actuary, Health Insurance Association of America, made during hearings before this Committee on April 6, 1977 of an increase nationwide of costs of disability benefits of $600 million represents a drop of a billion dollars from the Bailie figure of $1.6 billion. The differences between the figures indicate how conjectural all these figures are and that no one has any sound basis for assuming women will average more than 6 weeks absence once women are relieved of the inposition of mandatory leaves before and after childbirth.

Many of the electrical equipment manufacturers with whom IUE has entered into collective bargaining agreements for full coverage of pregnancy-related disabilities have apparently been able to purchase insurance without indicating to us that they had any problem. Several companies however have asked us if it was acceptable to us that they become self insurers as to the coverage of pregnancy-related disabilities as they were of the opinion that they could pay all claims directly at a total cost to the employers less than the premiums quoted to them by the insurance companies. The IUF has agreed to several such arrangements. A copy of such an agreement between Wilco Corporation and IUE Local 815 is annexed hereto as Attachment O. An arbitration award has recently been published which reveals that other employers and unions have made similar agreements for self insurance of the pregnancy disability claim at the same time that other disability claims were insured. Design & Mfg. Corp. and UAW Local 151, 68 LA 354 (Samuel S. Kates, arbitrator, March 14, 1977).

At least one insurance company, State Mutual Life Assurance Company of America, has recognized that employers may wish to become self insurers and has offered the public an arrangement by which the insurance company administers the program, by receiving and processing claims in a manner which appears to be the same as if the claim was insured but the employer pays all the cost of the claim plus a fee for administrative services instead of a premium. A copy of the folder which State Mutual supplies to potential customers for self-insured services is annexed hereto as Attachment P.

The employers with whom we have entered into agreements for coverage of pregnancy-related disabilities on the same basis as other disabilities have seemed generally well pleased with the results.

APPENDIX G

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS

AFL-CIO AND CLC
1126 16th Street, N.W.
Washington, D. C. 20036
Phone: 296-1206

October 28, 1975

[Addressed to Chairperson of each State
FEP Agency which has jurisdiction of
discrimination because of sex except
those whose guidelines were printed in
the BNA FEP Manual or the CCH EPG]

Dear:

I am an attorney for Martha V. Gilbert and the class composed of all female employees of the General Electric Company in the case of *Gilbert* v. *General Electric Co.*, 519 F.2d 661 (4th Cir., June 27, 1975), *cert. granted,* Nos. 74-1589 and 74-1590, 44 U.S.L.W. 3200 (Oct. 7, 1975), currently pending in the Supreme Court of the United States. In this case both the trial court and the Court of Appeals held that General Electric Company violated Title VII of the Federal Civil Rights Act by excluding income maintenance for female employees disabled by childbirth or pregnancy from a sick pay system provided in the form of a sickness and accident insurance plan which covered all employee disabilities except those related to pregnancy. I am writing to inquire as to the status of such plans in your state.

In order to have all the facts necessary to make a full presentation to the Supreme Court in our brief, I would appreciate your answering the following questions:

(1) Under state law or by court decision or your agency's interpretation of applicable law, whether by way

Attachment A

of guidelines, decisions, or otherwise, is such a plan prohibited discrimination on the basis of sex?

(2) If there is no express statutory provision, regulation or case authority prohibiting such discrimination, has your agency formulated a policy with regard to disability insurance programs and pregnancy?

(3) Based on your experience with employer practices in your state, is it common for income maintenance plans or other benefit plans to exclude payment for pregnancy and pregnancy-related disabilities? Have employers, in an effort to comply with fair employment practice laws, modified their income maintenance plans to cover payments for pregnancy disabilities?

Please send us a copy of any guideline, regulation, decision, or opinion which could be cited or furnished to the Supreme Court as authority for any statement as to the status of the law in your state on this issue.

Any further information you can provide will be welcome.

I would appreciate your prompt reply, as the deadline for our brief is fast approaching. Thank you for your cooperation.

Sincerely,

/s/ RUTH WEYAND (DRL)
Ruth Weyand
Attorney for
Martha V. Gilbert, et al.,
Respondents in No. 74-1589
and Petitioners in No. 74-1580

APPENDIX C

Letter received in response to form letter printed Gilbert original brief, pp. 47a-48a

George R. Ariyoshi
Governor

Joshua C. Agsalud
Director

Robert C. Gilkey
Deputy Director

Orlando K. Watanabe
Administrator

STATE OF HAWAII

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION

825 MILILANI STREET
P. O. BOX 3769
HONOLULU, HAWAII 96812

November 11, 1975

Ms. Ruth Weyand
Attorney
International Union of Electrical,
Radio and Machine Workers
AFL-CIO and CLC
1126 16th Street, N. W.
Washington, D. C. 20036

Dear Ms. Weyand:

This is in response to your October 28, 1975 letter relating to questions of income maintenance for female employees disabled by pregnancy or childbirth.

Section 392-3(5) of the Hawaii Temporary Disability Insurance (TDI) Law defines disability as "total inability of an employee to perform the duties of his employment caused by sickness, *pregnancy, termination of pregnancy*, or accident other than a work injury as

ATTACHMENT B

defined in section 386-3 (underscoring added)." Hence, all employers subject to the TDI Law are required to pay TDI benefits to women who become disabled because of pregnancy or complication resulting from pregnancy as long as they meet the eligibility requirements of sections 392-25 and 392-26 (see enclosed lawbook). This no doubt will answer the three questions you raised in your letter.

If you have any other questions or desire further clarification regarding our pregnancy provision, please let us know.

Very truly yours,

/s/ JOSHUA C. AGSALUD
Joshua C. Agsalud, Director
Labor and Industrial Relations

Enc.

APPENDIX G

Data on contributions and benefits paid during calendar years 1970 to 1975 inclusive under Hawaii Temporary Disability (TDI) Law.

[Data supplied by Orlando K. Watanobe]

TDI CONTRIBUTIONS AND BENEFITS PAID EXPERIENCE
CY 1970-75 INCLUSIVE

Based on Annual Reports Submitted by Employers and Insurance Carrier

	1	2	3	4	5	6
	1970	1971	1972	1973	1974	*1975
Total Contributions	4,630,132	5,577,230	6,138,519	6,702,457	7,436,755	4,977,520
Employer Share	3,715,730	4,569,827	4,626,694	5,155,308	6,077,854	4,344,564
Employee Share	914,402	1,007,403	1,511,825	1,547,149	1,358,901	632,956
Total Benefits Paid	1,171,148	1,823,237	2,242,883	2,454,532	3,877,455	3,164,893
Ins. Cos. Retained	3,452,984	3,753,993	3,095,636	4,247,925	3,558,854	1,812,627
No. Persons Paid	3,474	6,752	5,860	6,332	8,954	9,054
No. Weeks Paid	22,783	31,424	36,268	44,679	52,871	45,107
Ave. Total Benefits Paid Each Person	337.12	270.02	382.74	384.64	433.04	349.56
Ave. Weekly Ben.	51.40	58.02	61.84	54.94	73.34	70.16
Ave. Duration	6.6	4.7	6.2	7.1	5.9	5.0

*Based on about 75% of annual reports.

ATTACHMENT C

ATTACHMENT D

Data compiled from employers' and insurance carriers' annual reports to the Department of Labor and Industrial Relation for Hawaii for benefits paid under Hawaii Temporary Disability (TDI) Law for calendar year 1975.

Average Total Benefit Paid to	Employees	$345.97
	Men	465.14
	Women	279.22
Average Weekly Benefit Paid to	Employees	$ 70.75
	Men	90.00
	Women	63.28
Average Duration (weeks)	Employees	4.9
	Men	5.1
	Women	4.4

The average duration figure is based on disability due to accident and sickness, as well as pregnancy.

APPENDIX H

August 26, 1976

Mr. Orlando K. Watanabe
Administrator
Disability Compensation Division
825 Mililani Street, Room 201
Honolulu, Hawaii 96813

Dear Mr. Watanabe:

Thank you for your letter of August 17, 1976.

Enclosed herewith is a copy of four pages of a brief filed in the U.S. Supreme Court in the case of *Geduldig v. Aiello*, No. 73-640, which include some statements we wish to check out.

First, it states that the following insurance Companies have at least 90% of the TDI business in Hawaii:

> "Travelers Insurance Company, Industrial Indemnity Insurance Company, Pacific Insurance Company, Pacific Guardian Insurance Company, First Insurance of Hawaii, and Hawaii Insurance and Guarantee Company.

What is the exact percentage of TDI business in Hawaii these companies have at the present time?

Second, it states that only one of these companies, Industrial Indemnity, has raised its rates *at all* as a result of the amendment of May 8, 1973, requiring the inclusion of disabilities arising from normal pregnancy and childbirth. What are the facts on this point at the present time?

Your consideration is greatly appreciated.

Very truly yours,

BENJAMIN C. SIGAL

BCS:ih
encl.

ATTACHMENT E

defined in section 386-3 (underscoring added)." Hence, all employers subject to the TDI Law are required to pay TDI benefits to women who become disabled because of pregnancy or complication resulting from pregnancy as long as they meet the eligibility requirements of sections 392-25 and 392-26 (see enclosed lawbook). This no doubt will answer the three questions you raised in your letter.

If you have any other questions or desire further clarification regarding our pregnancy provision, please let us know.

Very truly yours,

/s/ JOSHUA C. AGSALUD
Joshua C. Agsalud, Director
Labor and Industrial Relations

Enc.

APPENDIX I

George R. Ariyoshi
Governor

Joshua C. Agsalud
Director

Robert C. Gilkey
Deputy Director

Orlando K. Watanabe
Administrator

STATE OF HAWAII

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION
825 MILILANI STREET
P. O. BOX 3769
HONOLULU, HAWAII 96812

September 1, 1976

Benjamin C. Sigal, Esq.
Shim, Sigal, Tam & Naito
A Law Corporation
Ste 800, 333 Queen Street
Honolulu, Hawaii 96813

Dear Mr. Sigal:

Re: Temporary Disability Insurance Experience

In response to your letter of August 26, 1976, the TDI experience of the six insurance companies named in your letter plus Hawaiian Life is as follows:

1973 - 86.3%
1974 - 87.1%
1975 - 82.9%

With respect to the rates charged by the six named carriers, since different rates are charged to different employers, a composite rate of each company and by male-female breakdown was obtained by dividing the total contributions paid by employers and employees by (taxable wages ÷ 100). Information is attached.

The above information was obtained from annual reports filed by TDI carriers.

Very truly yours,

/s/ Orlando K. Watanabe
Orlando K. Watanabe
Administrator

SS/cy
Att.

APPENDIX G

Average rates charged by six insurance companies writing the majority of disability insurance in Hawaii, 1970 - 1975 under Hawaii Temporary Disability Insurance (TDI) Law.

The following chart contains the average rates charged by the six insurance companies that write the majority (over eighty per cent) of temporary disability insurance in Hawaii under the TDI Law. Because different rates are charged to different employers, a composite rate of each insurer, and when available separately for men and women employees, was calculated by dividing the total contributions paid by employers and by employees by (taxable wages ÷ 100).

	1970	1971	1972	1973	1974	1975
First Insurance	$ .99	$ .91	$ .79	$ .73	$ .71	$ .61
Men			.81	.73	.73	.55
Women			.76	.70	.69	.68
Hawaiian Insurance & Guaranty	.73	.78	.64	.56	.57	.57
Men			.64	.56	.55	.55
Women			.64	.56	.60	.59
Industrial Indemnity	.92	.88	.72	.54	.55	.74
Men			.72	.52	.54	.71
Women			.73	.58	.57	.77
Pacific Guardian	.67	.73	.63	.60	.61	.60
Men			.62	.59	.61	.59
Women			.64	.62	.61	.61
Pacific Insurance	1.32	1.77	1.90	1.42	.95	.64
Men			1.53	1.22	.94	.61
Women			2.43	1.71	.96	.67
Travelers Insurance	.85	.82	.72	.69	.62	.59
Men			.67	.65	.61	.56
Women			.78	.76	.65	.65

APPENDIX K

FIRST INSURANCE COMPANY OF HAWAII, LTD.

January 8, 1976

Mr. Ben C. Sigal, Attorney
333 Queen Street
Suite 800
Honolulu, Hawaii 96813

Dear Mr. Sigal:

This letter will confirm the fact that First Insurance Co.'s TDI rates were not increased because of the fact that pregnancies are now a covered disability.

If we can of further service, please call.

Warm regards,

/s/ IVAN H. MIYAMOTO
Ivan H. Miyamoto,
Superintendent
Health Insurance Department

IHM:lh

ATTACHMENT H

APPENDIX L

FIRST INSURANCE COMPANY OF HAWAII, LTD.

January 13, 1976

Benjamin Sigal
333 Queen Street Suite 800
Honolulu, Hawaii 96813

Dear Mr. Sigal:

On January 1, 1975 the Temporary Disability Insurance Department lowered it's rate to become more competitive with other insurers. The rate reduction applied to both male and female, but the proportionate rate reduction for each sex is unknown.

Sincerely,

/s/ NOBUO KIWADA
Nobuo Kiwada
Temporary Disability
Insurance

ATTACHMENT I

Pacific Guardian
[illegible]

[illegible]
[illegible]

January 13, 1976

Mr. Benjamin Sigal
Attorney at Law
333 Queen St., Ste. 800
Honolulu, Hawaii 96813

Dear Mr. Sigal:

Pacific Guardian Life Insurance Company has not increased the Temporary Disability Insurance rate even after pregnancy was included as a disability.

Sincerely yours,

(Mrs.) Ethel K. Sasaki
Assistant Vice President
Temporary Disability Division

EKS:nt

Attachment J

APPENDIX N

THE TRAVELERS

Group Department
Underwriting Division

January 27, 1976

International Union of Electrical,
Radio and Machine Workers
AFL-CIO
1126 16th St. N.W.
Washington, D.C. 20036

Re: Hawaii Temporary Disability Insurance

Dear Ms. Weyand:

In response to your inquiry date January 9, 1976, please be advised that there has been no increase in our TDI rates since 1970.

Should you have any further questions, please let me know.

Very truly yours,

/s/ Rebecca B. Mortlock
(Mrs.) Rebecca B. Mortlock
Assistant Underwriter
Group Underwriting
Division

ATTACHMENT K

(Revised 5-26-77)

ATTACHMENT 1

(to Statement of Ruth Weyand)

LIST OF EMPLOYERS WITH WHOM INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, HAS COLLECTIVE BARGAINING AGREEMENTS PROVIDING INCOME MAINTENANCE DURING ABSENCES DUE TO PREGNANCY-RELATED DISABILITIES FOR EQUAL AMOUNTS AND SAME MAXIMUM DURATION AS COVERAGE FOR OTHER DISABILITIES

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC or one of its locals has collective bargaining agreements with the following employers which provide that the employer will pay temporary disability benefits for absences due to pregnancy-related disabilities in the same amounts and for the same duration as for other disabilities:

Name of Employer	Location	Maximum Duration	Range of Weekly Benefits
A & B Beacon Business Machines Corp.	New York, N.Y.	26 weeks	60% of weekly wages but not more than $95
A. E. Electronics	New York, N.Y.	26 weeks	60% of weekly wages but not more than $95
Acme Electric Co.	Cuba, N.Y.	26 weeks	60% of weekly wages but not more than $95
Acrylic Optics (and Detroit Optometric Centers)	Detroit, Mich.	26 weeks	$70 - $130
Admiral Optical Co.	Detroit, Mich.	26 weeks	$70 - $130
Aetnacraft Industries, Inc.	Brooklyn, N.Y.	26 weeks	60% of weekly wages but not more than $95
Airco Speer Carbon Graphite	St. Marys, Pa.	13 weeks	$55

B & J Optical Services, Inc.	Lincoln Park, Okla.	26 weeks	$70 - $130
Birchbach Company Inc.	Freeport, N.Y.	26 weeks	60% of weekly wages but not more than $95
Bogen Communications Division, Lear Siegler, Inc.	Paramus, N.J.	26 weeks	2/3 of weekly wages but not more than $104
Brevel Motors Div. of McGraw-Edison Co.	Carlstadt, N.J.	26 weeks	2/3 of weekly wages but not more than $104
Cavitron Ultrasonics	Long Island City, N.Y.	26 weeks	60% of weekly wages but not more than $95
Chromalloy Corp.	Midwest City, Okla.	13 weeks	$60
Cooperative Services (also known as Detroit Coop.)	Detroit, Mich.	26 weeks	$70 - $130
Dearborn Optical Centers	Detroit, Mich.	26 weeks	$70 - $130
Duncan Electric Co.	Lafayette, Ind.	13 weeks	$35 to $50
EICO Electronic Instrument Co.	Brooklyn, N.Y.	26 weeks	60% of weekly wages but not more than $95
EON Corporation	Brooklyn, N.Y.	26 weeks	60% of weekly wages but not more than $95
Ever Ready Thermometer Co.	New York, N.Y.	26 weeks	60% of weekly wages but not more than $95
Executone, Inc.	Long Island City, N.Y.	26 weeks	60% of weekly wages but not more than $95
Fine Arts Optical Co.	Detroit, Mich.	26 weeks	$70 - $130
Foon & Cole, Optometrists	Detroit, Mich.	26 weeks	$70 - $130

Gap Instrument Corp.	Hauppauge, N.Y.	26 weeks	60% of weekly wages but not more than $95
Gem Electronic Dist. Inc.	Farmingdale, N.Y.	26 weeks	60% of weekly wages but not more than $95
General Industries	Forrest City, Ark.	26 weeks	$70
General Optical	Detroit, Mich.	26 weeks	$70 - $130
Grand Machining Co.	Detroit, Mich.	26 weeks	$90
Harrison Warehousing Inc.	Harrison, N.J.	26 weeks	2/3 of weekly wages but not more than $104
Heekin Can Div. of Diamond International	Ancor, Ohio	26 weeks	$110
Hi-Torc Department Brevel Motors	Carlstadt, N.J.	26 weeks	2/3 of weekly wages but not more than $104
Industrial Mica Corp.	Englewood, N.J.	26 weeks	2/3 of weekly wages but not more than $104
IRC Burlington Division of TRW Electronics Branch	Burlington, Iowa	13 weeks	50% of straight time wages but not less than $90 per week
ITT Electro-Products Div.	Roanoke, Va.	20 weeks	$70
James Crystal Mfg. Co.	Wyandotte, Mich.	26 weeks	$80
Lafayette Electronics Corp.	Paramus, N.J.	26 weeks	2/3 of weekly wages but not more than $104
Lafayette Radio Electronics Corp.	Syosset, N.Y.	26 weeks	60% of weekly wages but not more than $95
Laminall Plastics	Long Island City, N.Y.	26 weeks	60% of weekly wages but not more than $95

Larkin Optical	Detroit, Mich.	26 weeks	$70 - $130
Lektra Laboratories	College Point, N.Y.	26 weeks	60% of weekly wages but not more than $95
Loral Electronic Systems	Bronx, N.Y.	26 weeks	60% of weekly wages but not more than $95
Lundy Electronics & Systems, Inc.	Glen Head, N.Y.	26 weeks	60% of weekly wages but not more than $95
McNab, Inc.	Mt. Vernon, N.Y.	26 weeks	60% of weekly wages but not more than $95
Mastercraft Record Plating Co.	New York, N.Y.	26 weeks	60% of weekly wages but not more than $95
Milgray Electronics Inc.	Freeport, N.Y.	26 weeks	60% of weekly wages but not more than $95
Photovolt Corp.	New York, N.Y.	26 weeks	60% of weekly wages but not more than $95
Pontiac Coop.	Pontiac, Mich.	26 weeks	$70 - $130
Premier Metal Products Co.	Bronx, N.Y.	26 weeks	60% of weekly wages but not more than $95
Raycon Industries	Levonia, Mich.	26 weeks	$90
Robbins & Myers	Memphis, Tenn.	13 weeks	$50
Rowe International	Grand Rapids, Mich.		
Signal Transformer Co., Inc.	Inwood, N.Y.	26 weeks	$95
Thorne Optical	Detroit, Mich.	26 weeks	$70 - $130

Torch Tip	Pittsburgh, Pa.	13 weeks	$65
TRW Inc.	Philadelphia, Pa.	26 weeks	$100
Twin Valley Coop.	Battle Creek, Mich.	13 weeks	$70 - $130
United Transformer Co., A Division of TRW, Inc.	New York, N.Y.	26 weeks	60% of weekly wages but not more than $95
Wagner Electric Co.	St. Louis, Mo.	26 weeks	$120
Waldes Kohinoor, Inc.	Long Island City, N.Y.	26 weeks	60% of weekly wages but not more than $95
Wayne Optical Co.	Detroit, Mich.	26 weeks	$70 - $130
Wilco Corp.	Indianapolis, Ind.	26 weeks	$60
Wolverine Wire Products Inc.	Hazel Park, Mich.	26 weeks	66 2/3 of wages
W. D. Zobel Co.	Royal Oak, Mich.	26 weeks	66 2/3 of wages
Yardney Electric Corp.	Pawcatuck, Conn.	26 weeks	60% of weekly wages but not more than $90
Local #431, IUE, AFL-CIO CLC	New York, N.Y.	26 weeks	60% of weekly wages but not more than $95

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Transactions

The work of science is to substitute facts for appearances and demonstrations for impressions.—Ruskin

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OF MORTALITY AND MORBIDITY
EXPERIENCE

Attachment M

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II. GROUP WEEKLY INDEMNITY INSURANCE

This is the twenty-eighth annual report on the continuing study of the morbidity experience of Group Weekly Indemnity insurance. In compiling this report, the Committee has included the available experience of employer/employee groups and has excluded the experience of trusteeships and association cases insuring employees of the member employers and the experience of union cases, whether or not insurance depends upon continued employment. The experience of plans written under State Cash Sickness Laws and the experience of insured groups outside the United States have been excluded.

RATIO OF ACTUAL TO TABULAR CLAIMS

Throughout this report experience is presented in the form of ratios of actual to tabular claims, based on the 1947–49 weekly indemnity tabulars, as reported in the *1962 Reports*. Caution must be used in interpreting the data contained in this report because, among other reasons, the 1947–49 tabulars may not accurately reflect current claim patterns. The maternity tabulars do not reflect the substantial decline in birth rates in recent years, with the result that the actual-to-tabular ratios for maternity benefits are now down near the 40 per cent level, while the actual-to-tabular ratios for nonmaternity benefits are generally near 100 per cent or even higher; this wide difference is concealed and may create distortions when the experience for maternity and that for nonmaternity are combined. The tabulars also fail to reflect certain factors, such as age distribution, industry classification, or size of case, which may have a relevant effect on the experience results.

CONTRIBUTING COMPANIES

The Committee wishes to express its gratitude to the companies that generously contributed data to this study. The report contains experience for the years 1970, 1971, 1972, 1973, and 1974. Six companies contributed data for all five years. Two additional companies contributed data for the first four years. The results generally reflect the composite effect of variations in company practice in administration and claim procedures, as well as variations in experience among groups. It should be noted, however, that the contribution of one company has up until now represented a major portion of the total experience. That company was unable to contribute 1974 experience, with the result that there is some difficulty in comparing the results of this year's study with those of prior years.

Because we use three-year totals of experience, the contribution of that company to the total results shown in this year's report is still much greater than that of any other company.

The majority of the companies contribute exposures and claims based upon policy years ending in the calendar year designated. If the renewal dates for all cases included in the study were distributed uniformly over the year, then the central point of the exposure for each policy year would be approximately January 1 of that year. However, this assumption may not be very precise because of a concentration of policy renewals in January and July.

The following companies contributed experience for the study, although not all of them contributed 1974 data:

Aetna Life Insurance Company
Connecticut General Life Insurance Company
Continental Assurance Company
Equitable Life Assurance Society
Metropolitan Life Insurance Company
Occidental Life Insurance Company of California
Prudential Insurance Company of America
The Travelers Insurance Company

ANALYSIS OF EXPERIENCE

Table 1 shows the experience for the period 1972–74 for each of eight plans (four different elimination periods; two different maximum benefit periods), all of which provide a six-week maternity benefit. All size groups are included. The corresponding experience of nonjumbo groups only (units with less than 1,000 insured employees) is displayed in Table 2 for each of four plan combinations. For those nonjumbo units for which the data were available, Table 2 separates the combined experience into its nonmaternity and maternity segments. Also included in Table 2 for each of the four plan combinations is the nonjumbo experience for the period 1972–74 of plans that do not provide a maternity benefit. Table 3 is a five-year trend analysis of the Table 2 experience for each year 1970–74 inclusive. Since 1974 data do not include the contributions of two companies included in 1971–73, Table 3A reflects the experience for only those companies that contributed during 1974 and shows it for the years 1972–74. Table 4 is an analysis of experience by size of experience unit. Results are shown separately for plans with and without maternity benefits. Table 5 analyzes the nonjumbo experience of plans with no maternity benefit by the female per cent composition of the experience units. Table 6 is an analysis of claim ratios by industry.

Table 1 shows results very slightly better than the results of a year ago. Actual-to-tabular ratios for twenty-six-week plans continue to run higher than those for thirteen-week plans. The ratios shown in Tables 2 and 3 confirm this relationship for plans with maternity benefits, but the ratios for thirteen-week plans are actually higher in 1972–74 than the ratios for twenty-six-week plans. Compared with those in the 1971–73 study, ratios for thirteen-week plans stayed about the same, while ratios for twenty-six-week plans improved slightly.

TABLE 1

GROUP WEEKLY INDEMNITY EXPERIENCE
PLANS WITH SIX WEEKS' MATERNITY BENEFIT
ALL SIZE GROUPS
COMBINED 1972–74 POLICY YEARS' EXPERIENCE, BY PLAN

Plan	No. Experience Units	Weekly Indemnity Exposed (000)	Actual Claims Including Maternity (000)	Ratio of Actual to 1947–49 Weekly Indemnity Tabular
1-4-13	413	3,067	2,062	93%
4-4-13	195	934	375	66
1-8-13	1,720	11,815	8,356	107
8-8-13	309	2,406	1,664	113
Total, 13-week plans	2,637	18,222	12,457	103%
1-4-26	217	3,293	3,458	138%
4-4-26	30	592	499	109
1-8-26	1,432	20,550	19,647	128
8-8-26	167	8,123	4,966	80
Total, 26-week plans	1,846	32,562	28,570	116%
Total, all plans	4,483	50,784	41,027	112%

Tables 2 and 3 show that the ratios for plans with no maternity benefit are lower than the ratios for the nonmaternity segment of plans with maternity benefits. Table 3 demonstrates that this result, which may be attributable to plan or exposure characteristics not reflected in the tabulars, has existed for several years.

An analysis of Table 2 over the past several years shows a gradual shift from maternity to nonmaternity plans in the exposure. This may be related to the gradual overall improvement shown in Table 1 over the past several years.

Because Table 3 showed some rather substantial changes from 1973

TABLE 2—GROUP WEEKLY INDEMNITY EXPERIENCE
GROUPS WITH LESS THAN 1,000 EMPLOYEES EXPOSED
1972–74 POLICY YEARS' EXPERIENCE, BY PLAN

PLAN	NONMATERNITY AND MATERNITY COMBINED EXPERIENCE*				NONMATERNITY AND MATERNITY SEPARATE EXPERIENCE*						
	No. Experience Units	Weekly Indemnity Exposed (000)	Actual Claims (000)	Ratio of Actual to 1947–49 Weekly Indemnity Tabular	No. Experience Units	Weekly Indemnity Exposed (000)	Actual Claims		Ratio of Actual to 1947–49 Weekly Indemnity Tabular		
							Non-maternity (000)	Maternity (000)	Non-maternity	Maternity	Combined
	Plans with 6 Weeks' Maternity Benefit.										
13-week:											
4th-day sickness.	601	3,066	1,892	89%	381	2,133	1,433	39	104%	29%	97%
8th-day sickness.	1,995	12,054	8,351	107	1,197	7,768	5,141	296	114	39	103
Total	2,596	15,120	10,243	103%	1,578	9,901	6,574	335	111%	38%	102%
26-week:											
4th-day sickness.	238	2,911	2,699	123%	182	1,853	1,709	24	117%	25%	111%
8th-day sickness.	1,546	17,889	15,412	116	917	9,863	9,233	296	132	42	124
Total	1,784	20,800	18,111	117%	1,099	11,716	10,942	320	129%	40%	122%
	Plans with No Maternity Benefit										
13-week:											
4th-day sickness.	....	....	....	....	318	1,933	1,344	....	109%	....	....
8th-day sickness.	....	....	....	....	4,625	22,842	13,427	....	103	....	....
Total	....	....	....	....	4,943	24,775	14,771	....	101%	....	....
26-week:											
4th-day sickness.	....	....	....	....	340	3,474	2,799	....	100%	....	....
8th-day sickness.	....	....	....	....	5,734	33,576	24,174	....	99	....	....
Total	....	....	....	....	6,074	37,050	26,973	....	99%	....	....

* The separate experience exposure is less than the combined experience exposure because separate experience is not available for all groups.

TABLE 3—GROUP WEEKLY INDEMNITY EXPERIENCE GROUPS WITH LESS THAN 1,000 EMPLOYEES EXPOSED 1970-74 POLICY YEARS' EXPERIENCE, BY PLAN

PLAN	RATIOS OF ACTUAL TO 1947-49 TABULAR FOR POLICY YEAR ENDING IN:				
	1970	1971	1972	1973	1974
	Plans with 6 Weeks' Maternity Benefit				
Nonmaternity and maternity combined experience:					
13-week:					
4th-day sickness..........	94%	92%	93%	89%	70%
8th-day sickness..........	112	108	103	104	99
Total...............	108%	105%	101%	101%	94%
26-week:					
4th-day sickness..........	118%	124%	110%	110%	127%
8th-day sickness..........	118	122	120	107	120
Total...............	118%	122%	118%	108%	122%
Nonmaternity and maternity separate experience:*					
Nonmaternity:					
13-week:					
4th-day sickness.......	106%	99%	103%	104%	99%
8th-day sickness.......	121	113	113	115	117
Total...............	117%	110%	111%	112%	113%
26-week:					
4th-day sickness.......	120%	134%	120%	115%	102%
8th-day sickness.......	127	133	133	129	150
Total...............	125%	133%	131%	126%	143%
Maternity (all plans).........	51%	51%	40%	37%	42%
Combined:					
13-week:					
4th-day sickness.........	100%	96%	97%	97%	95%
8th-day sickness.........	112	106	102	104	109
Total..	109%	103%	101%	102%	106%
26-week:					
4th-day sickness.........	115%	128%	114%	109%	99%
8th-day sickness.........	120	126	125	121	138
Total...............	119%	126%	123%	119%	133%
	Plans with No Maternity Benefit				
13-week:					
4th-day sickness...........	107%	102%	97%	105%	119%
8th-day sickness...........	105	102	99	100	106
Total...............	106%	102%	99%	100%	107%
26-week:					
4th-day sickness...........	91%	94%	87%	105%	118%
8th-day sickness...........	94	105	104	98	101
Total...............	94%	103%	102%	99%	103

---

* The nonmaternity and maternity separate experience is also included in the nonmaternity and maternity combined experience.

TABLE 3A

GROUP WEEKLY INDEMNITY EXPERIENCE
GROUPS WITH LESS THAN 1,000 EMPLOYEES EXPOSED
1972–74 POLICY YEARS' EXPERIENCE, BY PLAN

PLAN	RATIOS OF ACTUAL TO 1947–49 TABULAR FOR POLICY YEAR ENDING IN:		
	1972	1973	1974
	Plans with 6 Weeks' Maternity Benefit		
Nonmaternity and maternity combined experience:			
13-week:			
4th-day sickness	77%	64%	70%
8th-day sickness	102	104	99
Total	97%	98%	94%
26-week:			
4th-day sickness	95%	92%	127%
8th-day sickness	112	92	120
Total	110%	92%	122%
Nonmaternity and maternity separate experience:*			
Nonmaternity:			
13-week:			
4th-day sickness	88%	83%	99%
8th-day sickness	107	109	117
Total	104%	104%	113%
26-week:			
4th-day sickness	103%	68%	102%
8th-day sickness	136	98	150
Total	130%	89%	143%
Maternity (all plans)	27%	22%	42%
Combined:			
13-week:			
4th-day sickness	81%	76%	95%
8th-day sickness	93	98	109
Total	91%	95%	106%
26-week:			
4th-day sickness	98%	64%	99%
8th-day sickness	129	92	138
Total	124%	83%	133%
	Plans with No Maternity Benefit		
13-week:			
4th-day sickness	96%	107%	119%
8th-day sickness	102	100	106
Total	101%	101%	107%
26-week:			
4th-day sickness	91%	109%	118%
8th-day sickness	89	97	101
Total	89%	98%	103%

---

* The nonmaternity and maternity separate experience is also included in the nonmaternity and maternity combined experience.

experience to 1974 experience, we constructed Table 3A to see whether these changes represented a trend or whether they could be explained by the change in the exposure distribution caused by the inability of our largest contributor to provide 1974 experience. This analysis was not particularly conclusive. In certain cells, especially the thirteen-week non-maternity and maternity combined, the Table 3A experience is fairly stable from year to year. Table 3A shows a great deal of variation from year to year in most of the other plan cells. This is difficult to explain,

TABLE 4

GROUP WEEKLY INDEMNITY EXPERIENCE ALL SIZE GROUPS COMBINED 1972–74 POLICY YEARS' EXPERIENCE, BY SIZE OF EXPERIENCE UNIT

Size	No. Experience Units	Weekly Indemnity Exposed (000)	Actual Claims Including. Maternity (000)	Ratio of Actual to 1947–49 Weekly Indemnity Tabular
	Plans with 6 Weeks' Maternity Benefit			
<50 lives	1,334	1,950	1,230	93%
50–99	1,147	4,100	2,775	99
100–249	1,151	9,784	7,760	112
250–499	507	11,275	8,830	110
500–999	241	8,811	7,759	119
Total <1,000	4,380	35,920	28,354	111%
1,000 or more	103	14,864	12,673	115%
Grand total	4,483	50,784	41,027	112%
	Plans with No Maternity Benefit			
<50 lives	4,950	8,664	5,105	90%
50–99	2,877	11,414	6,760	81
100–249	2,217	18,815	13,035	107
250–499	715	12,971	9,523	113
500–999	258	9,961	7,321	105
Total <1,000	11,017	61,825	41,744	100%
1,000 or more	163	22,856	16,173	97%
Grand total	11,180	84,681	57,917	99%

but the widest variations occur in cells with very small exposure. A great deal of caution should be used in attempting to draw conclusions about 1973–74 trends in weekly indemnity experience because the effect of the changing exposure base is not clear.

Table 4 appears virtually the same as in the 1971–73 study and continues to show that ratios tend to increase as the size of the group increases, except that jumbo experience for plans with no maternity benefits is slightly better than nonjumbo experience.

Table 5 shows that, for nonjumbo groups with no maternity benefit, with all benefit periods combined, and with more than 10 per cent female, there is a tendency for the ratios to increase as the female percentage increases. The table also shows a relatively higher ratio for groups with less than 11 per cent female. It is worth noting, however, that 40 per cent of the exposures fall in the "less than 11 per cent female" category. It is possible that this represents a coding inaccuracy. If groups of unknown per cent female distribution have in error been coded as "less than 11 per cent female" when, in fact, a higher classification is applicable, the actual-to-tabular ratio for these cases would be high if normal experience prevailed. The actual claims would reflect the higher cost associated with

TABLE 5

Group Weekly Indemnity Experience
Groups with Less than 1,000 Employees Exposed
1972–74 Policy Years' Experience, by Female Per Cent
Plans with No Maternity Benefit, All Benefit Periods Combined

Female Per Cent	No. Experience Units	Weekly Indemnity Exposed (000)	Actual Claims (000)	Ratio of Actual to 1947–49 Weekly Indemnity Tabular
<11%	4,625	24,648	16,301	102%
11–21%	1,967	10,368	5,900	90
21–31%	1,147	7,126	4,440	94
31–41%	899	5,724	3,874	100
41–51%	679	3,900	2,813	101
51–61%	499	3,158	2,393	105
61–71%	416	2,530	2,223	116
71–81%	330	1,886	1,606	108
81–91%	321	1,877	1,693	113
91–100%	134	608	496	122
Total	11,017	61,825	41,744	100%

TABLE 6

COMBINED 1970, 1971, 1972, 1973, AND 1974 POLICY YEARS' EXPERIENCE INDUSTRY ANALYSIS

Industry Code	Industry Description	United States Group Weekly Indemnity Insurance					
		Experience Units of All Size Groups All Plans, Combined Nonmaternity and Maternity Experience					Experience Units with Less than 1,000 Lives Exposed
		Number of Experience Units	Actual Weekly Indemnity Exposed for Industry (000)	Ratio of Exposure for Ind. to Total Exposure	Ratio of Actual to Tabular Claims	Ratio of Ind. A/T to Aggregate A/T	Ratio of Ind. A/T to Aggregate A/T*
Total	All industries	30,346	242,725	100.0%	107%	100%	100%
	Agriculture, forestry, and fisheries:						
01....	Agricultural production	87	206	0.1%	90%	84%	86%
07....	Agricultural services, hunting, trapping	87	308	0.1	69	64	66
08....	Forestry	11	207	0.1	(430)	(402)	(410)
09....	Fisheries	5	20	....	(156)	(146)	(149)
	Mining:						
10....	Metal mining	87	1,284	0.5	149	139	97
11....	Anthracite mining	310	2,182	0.9	130	122	84
12....	Bituminous coal and lignite mining	137	610	0.3	85	79	81
13....	Crude petroleum and natural gas	152	654	0.3	79	74	66
14....	Mining and quarrying of nonmetallic minerals, except fuels	219	1,384	0.6	104	97	99
	Contract construction:						
15....	Building construction—general contractors	209	1,536	0.6	165	154	70
16....	Construction other than building construction—general contractors	275	1,296	0.5	70	65	74
17....	Construction—special trade contractors	534	2,385	1.0	90	84	86
	Manufacturing:						
19....	Ordnance and accessories	33	692	0.3	121	113	113
20....	Food and kindred products	1,403	10,309	4.2	97	91	96
21....	Tobacco manufactures	96	1,072	0.4	93	87	121
22....	Textile mill products	713	5,941	2.4	117	109	110
23....	Apparel and other finished products made from fabrics and similar materials	453	2,350	1.0	107	100	104
24....	Lumber and wood products, except furniture	597	3,679	1.5	99	93	83
25....	Furniture and fixtures	543	3,348	1.4	102	95	97
26....	Paper and allied products	1,120	11,923	4.9	137	128	116
27....	Printing, publishing, and allied industries	1,004	8,230	3.4	95	89	90
28....	Chemicals and allied products	660	12,429	5.1	86	80	94
29....	Petroleum refining and related industries	131	725	0.3	87	81	88
30....	Rubber and miscellaneous plastics products	523	3,998	1.7	131	122	124
31....	Leather and leather products	286	2,153	0.9	120	112	111
32....	Stone, clay, glass, and concrete products	824	5,506	2.3	143	134	116
33....	Primary metal industries	1,143	11,425	4.7	143	134	129
34....	Fabricated metal products, except ordnance, machinery, and transportation equipment	2,423	19,008	7.8	122	114	119
35....	Machinery, except electrical	2,690	26,746	11.0	116	108	104
36....	Electrical machinery, equipment, and supplies	1,339	22,429	9.2	117	109	101
37....	Transportation equipment	829	10,163	4.2	130	122	121
38....	Professional, scientific, and controlling instruments; photographic and optical goods; watches and clocks	411	4,043	1.7	96	90	99
39....	Miscellaneous manufacturing industries	544	3,851	1.6	114	107	103
	Transportation, communication, electric, gas, and sanitary services:						
40....	Railroad transportation	21	120	0.1	(110)	(103)	(105)
41....	Local and suburban transit and interurban passenger transportation	245	1,814	0.8	107	100	110
42....	Motor freight transportation and warehousing	461	2,342	1.0	69	64	74
44....	Water transportation	79	413	0.2	106	99	93

* The aggregate A/T for smaller size groups is 105 per cent. Ratios for industries with less than 50 experience units and less than 0.3 per cent of total exposure are shown in parentheses.

TABLE 6—*Continued*

Industry Code	Industry Description	United States Group Weekly Indemnity Insurance					
		Experience Units of All Size Groups All Plans, Combined Nonmaternity and Maternity Experience					Experience Units with Less than 1,000 Lives Exposed
		Number of Experience Units	Actual Weekly Indemnity Exposed for Industry (000)	Ratio of Exposure for Ind. to Total Exposure	Ratio of Actual to Tabular Claims	Ratio of Ind. A/T to Aggregate A/T	Ratio of Ind. A/T to Aggregate A/T*
	Transportation, communication, electric, gas, and sanitary services—Continued						
45....	Transportation by air	63	371	0.2%	57%	53%	54%
46....	Pipeline transportation	5	16	....	(25)	(23)	(24)
47....	Transportation services	71	384	0.2	100	93	95
48....	Communication	131	758	0.3	63	59	60
49....	Electric, gas, and sanitary services	185	1,483	0.6	97	91	93
	Wholesale and retail trade:						
50....	Wholesale trade	2,419	10,774	4.4	70	65	68
52....	Building materials, hardware, and farm equipment dealers	255	783	0.3	72	67	69
53....	Retail trade—general merchandise	364	9,993	4.1	71	66	85
54....	Food stores	402	1,854	0.8	101	94	86
55....	Automotive dealers and gasoline service stations	1.170	3,406	1.4	81	76	73
56....	Apparel and accessory stores	207	1,623	0.7	77	72	80
57....	Furniture, home furnishings, and equipment stores	230	906	0.4	85	82	84
58....	Eating and drinking places	278	934	0.4	110	103	104
59....	Miscellaneous retail stores	332	1,283	0.5	85	79	84
	Finance, insurance, and real estate:						
60....	Banking	156	590	0.2	50	47	48
61....	Credit agencies other than banks	120	460	0.2	82	77	78
62....	Security and commodity brokers, dealers, exchanges, and services	38	190	0.1	(65)	(61)	(62)
63....	Insurance carriers	108	1,028	0.4	103	96	91
64....	Insurance agents, brokers, and service	32	204	0.1	(61)	(57)	(58)
65....	Real estate	158	553	0.2	91	85	87
66....	Combinations of real estate, insurance, loans, and law offices	9	10	....	(52)	(49)	(50)
67....	Holding and other investment companies	48	323	0.1	(100)	(93)	(95)
	Services:						
70....	Hotels, rooming houses, camps, and other lodging places	159	1,299	0.5	93	87	90
72....	Personal services	288	563	0.2	85	79	81
73....	Miscellaneous business services	438	1,788	0.7	70	65	64
75....	Automobile repair, automobile services, and garages	108	574	0.2	106	99	101
76....	Miscellaneous repair services	105	420	0.2	147	137	117
78....	Motion pictures	23	511	0.2	(73)	(68)	(71)
79....	Amusement and recreation services, except motion pictures	94	326	0.1	93	87	89
80....	Medical and other health services	331	4,267	1.8	82	77	90
81....	Legal services	42	186	0.1	(75)	(70)	(71)
82....	Educational services	161	1,241	0.5	79	74	83
84....	Museums, art galleries, botanical and zoological gardens	11	65	....	(112)	(105)	(107)
86....	Nonprofit membership organizations	192	1,429	0.6	82	77	81
88....	Private households	3	8	....	(82)	(77)	(78)
89....	Miscellaneous services	217	1,056	0.4	68	64	66
	Government:						
91....	Federal government	69	388	0.2	92	86	88
92....	State government	41	881	0.4	60	56	78
93....	Local government	497	2,468	1.0	92	86	83
94....	International government	18	54	....	(96)	(90)	(91)
Total	All industries listed above	30,762	242,234	99.8%	107%	100%	100%
	All other industries	84	494	0.2%	104%	97%	86%

* The aggregate A/T for smaller size groups is 105 per cent. Ratios for industries with less than 50 experience units and less than 0.3 per cent of total exposure are shown in parentheses.

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female risks, and the tabular would erroneously reflect the more favorable experience expected for male risks.

This year we have compiled a study of actual-to-tabular claim ratios by industry based on the years 1970–74. This is published only once every five years. The industry experience analysis in Table 6 is shown by ratio of actual to tabular for all size groups and by industry actual-to-tabular ratios compared with aggregate actual-to-tabular ratios for nonjumbo experience units. Among industries represented by either at least fifty experience units or 0.3 per cent of the total exposure, the range of variation of experience ratios by industry for all size groups extends from a low of 50 per cent for banking to a high of 165 per cent for building construction—general contractors. For nonjumbo units, banking was again the lowest, with a ratio that was 48 per cent of the average, while primary metal industries ranked highest at 129 per cent.

Generally, among industries with either fifty experience units or 0.3 per cent of the total exposure, the ratios did not vary substantially from those found in the experience period 1965–69. There were a few exceptions. In the all-size-group study, bituminous coal and lignite mining and local and suburban transit and interurban passenger transportation showed large decreases since the last study. Building construction—general contractors, stone, clay, glass and concrete products, credit agencies other than banks, automobile repair, automobile services, and garages and miscellaneous repair services all showed higher ratios.

Nonjumbo experience did not appear to be as volatile, and, among industries that had 1 per cent or more of the total exposures, there were no variations of great magnitude.

Care should be exercised in the use of the analysis by industry, because the industry actual-to-tabular ratios do not take account of possible variations by plan or by age and sex.

This study was made by Alexander J. Bailie, a Fellow in the Society of Actuaries since 1960, who is the actuary in charge of actuarial functions pertaining to group insurance for Metropolitan Life Insurance Company.

G.E. EXHIBIT NO. 13

Cost Estimates re
Pregnancy Benefits

SHORT TERM DISABILITY BENEFITS AND MATERNITY COVERAGE U.S. GROUP INSURANCE COVERAGE AND SALARY CONTINUANCE

To provide all those employees covered for short term disability with maternity coverage on the same basis as any other disability:

Assuming the Average Duration of Maternity Benefits would be:	20 weeks	25 weeks	30 weeks
Total Maternity Benefits to be provided per year	$1,230 million	$1,538 million	$1,845 million
Total Maternity Benefits now provided per year	225 million	225 million	225 million
Increase in Total Benefits per year	1,005 million	1,313 million	1,620 million

Short Term Disability Benefits and Maternity Coverage

In developing the cost for maternity coverage on the same basis as any other disability, the following assumptions were used:

1. The annual number of births in the United States is approximately 3,250,000. (Source: U.S. Department of Health, Education, and Welfare, data published in the New York Times, March 2, 1973.)

Attachment N

2. About 40% of pregnant women are employed during pregnancy. (Source: U.S. Department of H.E.W., National Center for Health Statistics Report, Series 22, No. 7, September 1968, pg. 16.)
3. Approximately 63% of the employed civilian labor force has some form of employer-sponsored short term disability income protection. (Source: Health Insurance Institute, "Source Book of Health Insurance 1972-1973", pg. 25.)
4. The average short term disability benefit for covered women is about $75 per week.
5. It is estimated that of those women covered for short term disability benefits, 60% have maternity coverage with an average maximum duration of six weeks. (Source: Society of Actuaries Transactions 1972, No. 2, June 1972, pg. 190-202.)

G.E. EXHIBIT NO. 16 - Federal Personnel Manual, Revised July 1969, Subchapter 13, Maternity Leave.

Subchapter 13. Maternity Leave

13–1. DEFINITION

Maternity leave is a period of approved absence for incapacitation related to pregnancy and confinement. It is chargeable to sick leave or any combination of sick leave, annual leave, and leave without pay.

AGREEMENT TO SELF-INSURE

The Company hereby agrees to pay regular and customary claims for Accident and Sickness benefits related to disabilities associated with pregnancy as if those claims had arisen under and were covered by the current Accident and Sickness policy. That is, the extent of coverage and claims eligible for coverage will be decided by the terms and conditions of the current Accident and Sickness policy as that policy would read if pregnancy or maternity related disabilities were covered thereunder.

Should the United States Supreme Court determine at any time during the life of the current collective bargaining agreement that it is not illegal to exclude maternity and maternity-related disabilities from an Accident and Sickness policy, the foregoing agreement shall be null and void and the Company shall no longer be obligated to pay any employees' claims for Accident and Sickness benefits related to pregnancy or disabilities associated with pregnancy.

International Union of Electrical
Radio and Machine Workers, AFL-CIO-CLC,
and its Local No. 815
by Bernice Batton
Carol Matheson
Betty Hunterson
Nettie Keys
Charles Ziegler

Dated Aug. 18, 1975

Wilco Corporation
by Loren F. Spears
O.B. Martin

Dated Aug. 18, 1975

Attachment O

Mr. HAWKINS. Mr. Weiss, do you have any questions?

Mr. WEISS. I have no questions.

Mr. HAWKINS. Mr. Sarasin.

Mr. SARASIN. I have no questions. I would like to thank the panel for their testimony this morning.

Mr. HAWKINS. Thank you both, Ms. Weyand and Mr. Mitchell.

That concludes our hearings this morning.

[Whereupon, at 12:35 p.m., the subcommittee adjourned, subject to call of the Chair.]

[Material submitted for inclusion in the record follows:]

STATEMENT OF CONGRESSMAN CLAUDE PEPPER BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES IN SUPPORT OF H.R. 5055

Mr. Chairman, I am in complete support of H.R. 5055 and I am pleased to submit this statement advocating its passage. As both a cosponsor of H.R. 5057, an identical bill, and as a Member of the House, I urge that we move immediately to end employment discrimination based on pregnancy, a condition the presence of which so clearly rests on the worker's being a woman.

Our efforts are necessary because of the Supreme Court's decision of December 7, 1976 in Gilbert vs. General Electric. The Court held that the exclusion of pregnancy related disability from a temporary disability plan does not constitute sex discrimination under Title VII of the Civil Rights Act of 1964. Our own common sense tells us pregnancy is as sex-specific to the female as vasectomies and prostatectomies are to the male. Nevertheless, the Court held that the provision of disability benefits for the latter, while excluding the former from coverage did not constitute discrimination on the basis of sex as is forbidden in Title VII of that great act. Section 703(a)(1).

Furthermore, the decision permitted no reliance upon the Equal Employment Opportunity Commission's guidelines of 1972 to remedy the inequity manifest in such an exclusion. These guidelines specifically state the following:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. . . . 29 CFR 1604.10(b)

Congress demonstrated its support for the EEOC position in July of 1975 when we approved HEW guidelines to implement Title IX of the Education Amendments of 1972. These guidelines followed the EEOC guidelines whereby pregnancy and pregnancy related disabilities were to be considered as any other temporary disability for all job-related purposes.

In the majority's opinion, however, "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law . . ." (SC Nos. 74-1589, 74-1599, pg. 15).

Therefore, Mr. Chairman, we must give such force of law to our previous intentions. We must correct this injustice as well as provide the courts with their necessary statutory basis for future decision. To allow such an exclusionary practice based on a sex-specific condition to continue in the face of Congressional intent is contrary to our notions of equality and decency. The nearly 40 million women workers in this country must be assured that wherever a temporary employment disability plan is in effect, they will be accorded the same protection against financial hardship as their male counterparts.

Mr. Chairman, I respectfully urge this subcommittee to approve H.R. 5055 without delay to provide that discrimination based on pregnancy be included in the coverage of Title VII of the Civil Rights Act of 1964. Thank you.

National Retail Merchants Association

NRMA

1000 Connecticut Avenue, N.W
Washington, D.C. 20036
202/223-8250

April 25, 1977

The Honorable Augustus F. Hawkins
Chairman
Equal Opportunities Subcommittee
House Education and Labor Committee
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the National Retail Merchants Association (NRMA), I am pleased to submit this statement on proposed legislation dealing with sex discrimination on the basis of pregnancy. We would appreciate your including NRMA's comments as part of your hearing record on this legislation.

By way of background, NRMA is a national, non-profit trade association composed of over 3,200 members who operate more than 35,000 department, chain and specialty stores in the general merchandise industry. Three-fourths of NRMA's members are small businesses, with annual sales under $1 million. Our members employ more than 2 million people.

Thank you for the consideration of our comments.

Sincerely,

Vick French

Verrick O. French
Vice President
Governmental Affairs

VOF:TM:pmm

Enclosure

EXECUTIVE OFFICERS

Chairman of the Board
MERVIN G. MORRIS
Chairman of the Board
Mervyn's
Hayward, California

First Vice Chairman of the Board
DONALD V. SEIBERT
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Amfac Merchandising Corporation
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President
JAMES R. WILLIAMS
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STATEMENT OF NATIONAL RETAIL MERCHANTS ASSOCIATION ON LEGISLATION DEALING WITH SEX DISCRIMINATION ON THE BASIS OF PREGNANCY

EQUAL OPPORTUNITY SUBCOMMITTEE
HOUSE EDUCATION AND LABOR COMMITTEE

APRIL 25, 1977

STATEMENT OF NATIONAL RETAIL MERCHANTS ASSOCIATION ON PROPOSED PREGNANCY DISCRIMINATION LEGISLATION

This statement expresses many of the concerns retailers have regarding recently proposed legislation which would amend Title VII of the Civil Rights Act to require employers to provide precisely the same disability and medical benefits for pregnant employees as they do for those temporarily disabled due to illness or accident.

The National Retail Merchants Association ("NRMA") is a voluntary association whose members operate approximately 33,000 general merchandise retail outlets throughout the United States. While its membership includes all of the nationally-known chain and department stores, a substantial part of NRMA's membership strength rests among small, independently-owned retail establishments. A majority of its members have annual sales under five million dollars, and two-thirds of these have annual sales under one million dollars.

The membership of NRMA is most concerned by the introduction of this proposed legislation. Adoption of such legislation would have a particularly severe adverse financial impact upon the retail industry where between 80 and 85 percent of all employees are women. In addition, the amendment to Title VII seems destined to have a negative impact upon disability and medical benefit programs made available to retail employees.

Background

Late last year, the Supreme Court of the United States ruled in General Electric Company v. Gilbert, that an employer does not violate the Civil Rights Act of 1964 by excluding pregnancy-related disabilities from coverage under its disability income protection plan. The Court rested its decision primarily upon the fact that there was nothing in the language of Title VII or in its legislative history to support an inference that Congress intended to require that pregnancy be treated in the same manner as other disabilities. But, it also relied upon two other significant factors in reaching its decision:

1. Pregnancy is unlike other disabilities in that generally it is voluntarily induced. It is therefore reasonable and lawful to treat pregnancy differently than "involuntary" disabilities; and

2. In creating a benefit package, an employer does not have an unlimited amount of funds to spend, and is normally unable to satisfy every want of every employee. It is neither unreasonable nor improper for an employer to seek to provide a balanced benefit package which will best serve overall employee needs.

As will be discussed, these two factors militate strongly against adoption of the proposed amendment.

The Retailing Industry

Prior to considering the likely impact upon retailing of legislation aimed at reversing the Supreme Court's Gilbert decision, it may be helpful to describe the structure of the retailing industry. Among the most significant characteristics of the industry are that it is both a low-profit margin industry and a labor-intensive industry.

Primarily because the general merchandise retail industry consists of a large number of relatively small enterprises, none of which dominate a given region on product line, the industry is characterized by intense price competition. Consequently, profit margins in the industry have historically been among the lowest in the business world.

In addition, retailing is highly labor-intensive. Payroll expenses (wages and fringe benefits) represent, by far, the largest single item of net operating expenses, accounting for 54% percent of net operating expenses as an overall average for the industry. Payroll expenses are particularly high in stores with annual sales under two million dollars.

Finally, perhaps the most significant characteristic of the retail industry, at least insofar as the proposed pregnancy discrimination legislation is concerned, is the very high proportion of female employees. While the percentage varies, it averages between 80 and 85 percent with a high concentration of women of child-bearing age. Many of these women are not the primary breadwinners in their families, but are people who take jobs in retailing to supplement the family's primary source of income or to earn extra spending money. Frequently, young married women take part-time jobs in retailing (an ever-increasing proportion of retail employees work part-time), and the turnover rate among them often is extremely high.

Pregnancy Is Normally a Voluntary, Planned-For Event, Financially Easier To Cope With Than Illness Or Accident

As the Supreme Court noted in its Gilbert decision, pregnancy is unlike other disabilities. Disability caused by illness or accident is unexpected and unplanned for, while pregnancy-related disability is normally both voluntary and planned for.

When a woman becomes pregnant, she and her family are usually able to prepare for the expected jolt to her earning power. The family may be able to save extra money in anticipation of the pregnancy so that income lost and medical expenses incurred because of the temporary disability will not have a devastating impact.

Involuntary disabilities caused by illness or accident are seldom expected. As a consequence, individuals and families are rarely able to prepare for the disruption to income which they represent, and such disruptions often cause havoc to a family's financial planning. Most employers who provide disability and/or medical benefits, recognizing that illness or accident cause far greater problems for an individual or family than does pregnancy, have chosen to use the limited funds they have at their disposal to cover only involuntary disabilities or to provide only limited benefits for pregnancy. For example, a 1975 NRMA survey of medical benefits provided by retailers revealed that only 5.9% provide maternity benefits on the same basis as for illness or accident.

The decision of most employers to provide protection against accident or illness while leaving pregnancy essentially uncovered is thus rationally motivated. It is a decision which reasonably may be viewed as being in the best interests of all employees, including women, since it best serves overall employee needs.

Payments For Pregnancy Related Disabilities Are Subject To Potentially Significant Abuse

As noted, covering pregnancy under a disability or medical benefit plan may be a less prudent use of available benefit dollars than furnishing more complete coverage for involuntary disabilities. In addition, paying disability benefits for pregnancy poses a significant problem of control of abuse. The availability of pregnancy disability benefits has an inevitable tendency to cause departure from work before actual disablement. Such early departure seems less likely to occur where no benefits are available. Similarly, after delivery, the availability of pregnancy disability benefits has a tendency to prolong the absence from work beyond the period of actual disablement.

There does not appear to be any feasible method of policing a pregnancy-disability system and preventing abuses. The experiences of employers in states which require pregnancy disability to be treated in the same manner as all other disabilities (New York, for example), indicates that physicians are simply unwilling or unable to exercise independent professional judgment as to the period of actual disablement. Such abuses lead to enormous increases in costs and, in the long run, can only serve to diminish benefit levels for all employees.

Fifty Percent Of All Working Women Who Give Birth Do Not Return To The Workforce

Most employees who become temporarily disabled because of sickness or accident return to work once they have recovered. An employer who pays out benefits to a disabled employee can normally expect to be partially compensated for his investment in that the employee, with all his or her experience, is likely to return to the employer's workforce. Where pregnancy is involved, however, the pattern is somewhat different. Only about 50 percent of all employees who leave employment as a result of pregnancy return to the workforce when they are able. It is believed that this percentage is even higher in retailing. Thus, the proposed legislation may realistically be viewed as mandating the payment of severance pay to the large proportion of employees who do not return to work rather than providing temporary disability benefits. Providing such a windfall for the pregnant employee who does not plan to return to work surely does nothing to carry out the recognized purposes of disability benefits and is, indeed, inconsistent with national population planning objectives. And again such a misuse of the system can only serve in the long run to limit benefit levels for those who suffer unexpected involuntary disabilities.

Passage Of The Proposed Amendment Will Serve As A Disincentive To Retailers To Provide and Improve Disability and Medical Benefits

The passage of the proposed amendment will, as noted, require all employers to treat pregnancy-related disabilities in precisely the same fashion as they treat other temporary disabilities. While proponents of the amendment may believe that passage will simply cause an increase in benefits for women who give birth while in the workforce, with no impact upon overall levels of disability and medical benefits, the facts of business life make this an unrealistic expectation, particularly in the retail industry. With a workforce comprised of at least 80 percent women, many of whom are of child-bearing age, it will be extremely costly for many retailers to provide benefits for pregnancy-related disabilities. A requirement that pregnancy-related disabilities be treated in the same manner as involuntary disabilities will have the inevitable effect of retarding improvement in overall disability and medical benefit levels.

Quite possibly, the high costs will compel some retailers to lower present levels of benefits. Of course, one version of the proposed legislation contains a provision which appears to be designed to prohibit employers from reducing any benefits as part of a plan to come into compliance with the legislation. This provision seems to be particularly harsh and unjustifiable. It would penalize most heavily those employers who in the past have been most generous in their coverage of involuntary disabilities suffered by men and women alike. It might also be construed as prohibiting any benefit modifications designed to reduce overall benefits costs or to restrict abuse of benefit programs. With or without this particular provision, the proposed amendment seems destined to bring about "equality" of benefits by depriving all employees of broader protection against involuntary and unexpected disabilities.

The Proposed Legislation Will Result In A Grossly Inequitable Distribution of Available Benefit Dollars

Benefit packages are normally designed to do the most good for the most people, consistent with the employer's own legitimate needs. The passage of this amendment would mean a permanent benefit imbalance in favor of women of child-bearing age. The experience of the General Electric Company, described in its brief to the Supreme Court in the Gilbert case, provides some sobering food for thought. General Electric has long provided its employees with a broad benefit package. Included within this package is coverage for almost every conceivable temporary disability, with the exception of those related to pregnancy. Notwithstanding the exclusion of pregnancy from coverage, General Electric's average cost per insured employee of total benefits paid under its disability insurance program was $82.57 for females and $45.76 for males in 1970 and $112.91 for females and $62.08 for males in 1971. Moreover, General Electric estimated that "were a full pregnancy benefit to be provided, the cost for the female benefit would be 300-330 percent of that for the male benefit."

There is a serious question as to whether such a disparate apportionment of available benefit dollars would serve the broader public interest. The proponents of the amendment to Title VII have ignored the substantial equality of treatment which exists in present benefit plans, and have sought to substitute a system which will create a marked imbalance in favor of a particular segment of the workforce. While we believe that such legislation will adversely affect employees throughout the workforce, we must point out that the impact is most severe in retailing where the proportion of women of child-bearing age is so high.

Conclusion

The proposed amendment seems to have been drafted without sufficient consideration of its implications in terms of the purposes of disability benefits and an equitable distribution of available benefit dollars. There are significant reasons for believing that the proposed amendment is not in the public interest. We submit that the proposed legislation demands exhaustive study on a cost/benefit basis before the Congress can come to a reasoned conclusion as to whether it should be adopted.

FEDERALLY EMPLOYED WOMEN, INC.
An Organization for Opportunity and Equality for Women in Government
NATIONAL PRESS BUILDING, WASHINGTON, D.C. 20045

Tele (202) 638-4404

Founded in 1968

TESTIMONY of FEDERALLY EMPLOYED WOMEN, INC. by PRESIDENT, MAE WALTERHOUSE BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITES of the HOUSE COMMITTEE ON EDUCATION AND LABOR.

Mr. Chairman, as President of Federally Employed Women, Inc. -- better known as FEW -- I am pleased to have this opportunity to express our strong support for H.R. 6075, which seeks to amend Title VII of the Civil Rights Act to prohibit sex discrimination on the basis of pregnancy.

FEW, an organization to promote opportunity and equality for women in government, has a fast growing membership of women employed in the federal government, many of whom are of childbearing age. It is our belief that this legislation, which has been cosponsored by more than 90 members in the House, is vital to overturn the Supreme Court's decision on December 7, 1976 in the case of Gilbert v. General Electric Company. The court held that in this case working women disabled by pregnancy or related conditions are not entitled by law to receive temporary disability compensation.

Yet, under GE's employee plan, a male employee could be paid up to $150 per week for medical disabilities for almost any conceivable disability including sex change operations and hair transplants. The Supreme Court decision is a shock and a great disappointment to women, especially those working women of childbearing age who may be forced to go on leave without pay for childbirth or pregnancy-related disabilities.

This decision is especially injurious to low-income workers who are either sole supporters or whose families are dependent upon the wife's earnings. Due to the court's ruling, in many cases families may be forced to go without necessities or may be forced to receive public assistance. Further, if women know that pregnancy will mean a loss of needed income, they may choose to have an abortion as an alternative.

Women no longer work to provide the family with "pin money". In today's economy, many women work because they must do so in order to keep pace with our escalating rate of inflation. In fact, 70 percent of all working women are either sole wage earners or are married to men who earn less than $7,000 per year. There are more married and unmarried women in the labor force today than ever before. More than 39 million women are either working or seeking work and almost 670,000 are Federally employed women. It is a myth to believe that once a woman has a baby she stays home. Rather, women financially need to continue working after a child is born in order to support themselves and their families.

Studies have shown that the cost of providing women with pregnancy benefits are far from prohibitive. If the disability period is defined as the time when women are medically certified as unable to work, for 95% of women, this disability period would last only 6 weeks or less. From figures supplied by General Electric, if six weeks of benefits had been paid by GE in 1971 and 1972 to all pregnant women, the increased cost would have been less than two-tenths of one per cent per hour in labor costs.

Further, according to figures based on actuarial evidence supplied in the Gilbert case, pregnancy benefits would end up costing U.S. industry less than $150 million more a year, including the fact that 60 percent of all women employees who are covered by a temporary disability plan may be already receiving benefits in the event of pregnancy-related disability.

The court's decision in the Gilbert case rejected the unanimous opinions of 24 lower Federal courts which had previously held that discrimination on the basis of pregnancy is sex discrimination in violation of Title VII of the Civil Rights Act of 1964. Further, the decision overrules EEOC guidelines on employment practices relating to pregnancy and childbirth, requiring that any pregnancy-related disability be treated the same as any other temporary disability with respect to the provisions of sick leave benefits and for all other job-related purposes.

Due to the previous passage of legislation in Congress to eliminate sex discrimination in employment, many women have been able to obtain career level positions in the government and private industry, in what once were male - dominated professions. Congress must now see to it that women can continue to be guaranteed equal rights under the law.

The court's decision in the Gilbert case is not only a setback for working women in private industry, but in the government as well. If Congress fails to enact vital legislation to overturn the court's decision, I am afraid that employers in both the public and private sectors may feel that they have the go-ahead for additional discriminatory practices based on pregnancy and other sex-related issues without fear of violating Title VII.

To abuse the present law protecting women and minorities against discrimination on the basis of race, sex, religion and national origin in every aspect of employment would be a devastating setback to the healthy growth and development of civil rights and women's rights in our society.

Thus, I urge the early passage of H.R. 6075 in the 95th Congress.

STATEMENT TO THE HOUSE EDUCATION AND LABOR COMMITTEE
BY THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES
ON HR 5055, TO AMEND TITLE VII OF THE
CIVIL RIGHTS ACT OF 1964

The League of Women Voters of the United States is a volunteer citizen education and political organization of 1,350 Leagues with approximately 137,000 members in 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Since the early 1960's, the League has supported programs and policies to promote equal employment opportunity. The League program explicitly supports "federal efforts to prevent and/or remove discrimination in education and employment and housing." The League recognizes the relationship between employment policy and welfare, and supports expanded job opportunities as an alternative to income assistance. In addition, we have acted vigorously to obtain passage of the Equal Rights Amendment in order to specify sexual equality as a constitutional right.

The League of Women Voters strongly supports HR 5055 a bill to amend Title VII of the Civil Rights Act of 1964 to define sex discrimination to include discrimination based on pregnancy or childbirth. The bill, a response to the recent General Electric Co. v. Gilbert decision by the Supreme Court, would require employers to treat pregnancy-related disabilities the same as all other disabilities in disability insurance programs. HR 5055 will provide a specific statutory basis for what was, until the Supreme Court decision, a policy of the Equal Employment Opportunity Commission, which considered exclusion from hiring, complete or partial denial of fringe benefits, or discharge because of pregnancy a violation of Title VII of the Civil Rights Act. This interpretation of Title VII was upheld by all six of the courts of appeals which considered the issue.

No current federal law specifically prevents private employers from discriminating on the basis of pregnancy. As thousands of complaints filed by women in recent years with the Equal Employment Opportunity Commission demonstrate, discrimination on the basis of pregnancy constitutes one of the major obstacles to equal participation in the marketplace by women. Often, women are fired or required to take fixed maternity leaves as soon as an employer finds out a woman is pregnant. Often, she is not rehired after the birth of her child. If rehired, she may be reinstated at a lower job or salary level. Or she may lose accrued seniority, which means she will be laid off first and will also forfeit retirement benefits. Discrimination based on pregnancy is especially cruel since it leads to loss of income when a family needs it most.

According to the Health Insurance Institute, 63 percent of employed U.S. civilians are covered by a nonoccupational disability insurance plan. Only one sixth of these plans are estimated to include some coverage for pregnancy-related absence from work. Even those plans which do cover pregnancy often limit coverage or provide smaller benefits for maternity than for other disabilities. The Gilbert decision gives employers the go ahead to drop coverage of pregnancy and child birth based on cost considerations alone.

The Gilbert decision seems to be based on the myth that working women can depend on their husband's income, and participate in the labor force on a temporary and marginal basis. But according to statistics collected by the Department of Labor for 1974, 70 percent of all working women worked to provide financial support which is essential to support their families. Over 15 million women workers were single, divorced, separated or widowed. In 1975, 13 percent of all families were headed by women. Half of these women worked, and their family's survival and well being was entirely dependent on the woman's earnings. Moreover, 3.1 million working women were married to men with incomes below $5,000 in 1974. An additional 6.4 million working women had husbands with incomes between $5,000 and $10,000.

In nearly half of all families with both spouses present, both husband and wife worked. Women contributed approximately 27 percent of family income. Women working year round, full-time, contributed two fifths of family income. And 12 percent of all wives who worked -- 2.5 million women -- contributed half or more of family income.

The financial contributions of working wives are of critical importance in raising family incomes above the poverty level, and in raising low income families to middle income levels. Only four percent of all husband-wife families had incomes below $5,000 in 1974 if the wife worked. Thirteen percent of two-partner families in which the wife did not work had incomes below $5,000 in the same year.

Thus, the effect of the discriminatory employment practices upheld by the recent Supreme Court decision will be felt not only by working women themselves, but by the millions of children and men who depend on the working woman's income.

The League agrees with the EEOC, the Gilbert plaintiffs and the courts of appeals, all of whom reasoned that exclusion of disabilities associated with pregnancy under a disability insurance plan violated Title VII because it subjects only women to an additional substantial risk of total loss of income due to a temporary medical disability. If HR 5055 is not enacted, current employer policies will force too many women to choose between having a child and keeping their job. Job loss due to pregnancy will force other women to resort to welfare in order to provide for their families.

Discrimination because of pregnancy -- or the ability to become pregnant -- has served as the basis for employment discrimination against women for decades. Failure to enact legislation specifically prohibiting employment discrimination based on pregnancy will be a major step backwards in the effort to achieve economic equality for women.

AMERICAN PUBLIC HEALTH ASSOCIATION
1015 Eighteenth Street, N.W., Washington, D.C. 20036 • (202) 467-5000

GEORGE PICKETT, M.D., M.P.H., *President*

April 20, 1977

The Honorable Augustus F. Hawkins
Chairman, Subcommittee on
Employment Opportunities
B 346A Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hawkins:

The American Public Health Association wishes to submit a statement for the hearing record in support of H.R. 5055 which prohibits discrimination based on pregnancy, childbirth or related medical conditions.

We urge Congress to act promptly on H.R. 5055 and vote favorably for its adoption. Thank you for your careful consideration of this testimony.

Very truly yours,

George Pickett

George Pickett, M.D., M.P.H.
President

Enclosure

H.R. 5055 - Sex Discrimination on the Basis of Pregnancy

Comments of the
AMERICAN PUBLIC HEALTH ASSOCIATION

Presented to the
Committee on Education and Labor
Subcommittee on Employment Opportunities

April 20, 1977

The American Public Health Association supports H.R. 5055 which prohibits discrimination based on pregnancy, child birth or related medical conditions. This legislation is necessary to overturn the recent Supreme Court decision in *General Electric v. Gilbert* which held that it is not sex discrimination within the meaning of Title VII of the 1964 Civil Rights Act to treat pregnancy and related disabilities differently than other temporary disabilities or exclude them from coverage entirely in employee insurance plans.

The proposed legislation properly amends the definition of sex discrimination in employment under Title VII to include discrimination "because of or on the basis of pregnancy, childbirth or related medical conditions." APHA feels that women who are pregnant should be treated the same for all employment purposes as other persons who are not pregnant, but who are similar in their ability or inability to work. To deny coverage for pregnancy-related disabilities is to deny the fact that these, too, are medical disabilities requiring an absence from work and loss of pay. Additionally, it should be realized that refusal to recognize the disabilities accompanying normal childbirth is frequently accompanied by a denial of any pregnancy-related disability, including complications of pregnancy, miscarriage, and disabilities which are triggered or exacerbated by pregnancy.

Most women, like most men, work because the economic wellbeing of their families depends upon the income they earn. The refusal to cover pregnancy disabilities is particularly discriminatory in the case of economically disadvantaged women, some of whom will be disabled by pregnancy and must stop working and will thereby suffer loss of vital income. Other women may be placed in a position where they may be forced to choose between the economic welfare of their families and the health and wellbeing of their child or themselves.

Evidence does not support the contention of some that pregnancy is a voluntary condition and need not be treated like other disabilities. Charles F. Westoff reported in Science, Vol. 191, January 1976 that 43 percent of the total births to married women in the U.S. during the period between 1966 and 1970 were unplanned. These figures do not account for births to unmarried women which one may assume may include a higher percentage of unplanned or unwanted pregnancies.

The purpose of a disability plan is to provide job security and protection against loss of income due to temporary disability. To exclude from this protection a disabling condition which biologically only women can encounter is to treat the working woman differently from the working man because of her sex. Such unequal treatment should not be condoned by Congress.

APHA urges Congress to act promptly on H.R. 5055 and vote favorably for its adoption.

NATIONAL CONFERENCE OF CATHOLIC BISHOPS
BISHOPS' COMMITTEE FOR PRO-LIFE ACTIVITIES
1312 MASSACHUSETTS AVENUE, N.W. • WASHINGTON, D.C. 20005 • 202/659-6673

April 19, 1977

Honorable Augustus F. Hawkins
Chairman, Subcommittee on
Employment Opportunities
B346A Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Hawkins:

I am writing to you on behalf of the U.S. Catholic Conference in regard to the proposed amendment to Title VII of the Civil Rights Act of 1964, "To prohibit Sex Discrimination on the Basis of Pregnancy."

The issue covered by this amendment, providing disability benefits to a pregnant woman to assist her in carrying through her pregnancy and in giving birth and immediate post-natal care to her child is a matter of social justice that has impact not only for pregnant women, their families and children, but also for the entire society. The welfare of the family, and especially mothers and children, is enhanced by programs insuring proper medical treatment and care. In fact, a system of family allowances, coupled with a national health program would provide the larger context for maternal and child health care, which would also insure disability benefits for women with problems associated with pregnancy and for birth and immediate post-natal care. Such a program respects the dignity and well being of women, and also the value and welfare of children throughout the months of pregnancy as well as after birth. Particularly at this time in history, when the new medical specialty of perinatology is opening so many new avenues of improving the outcome of pregnancy and insuring the safety and well being of pregnant women and their children during pregnancy and in the months immediately after birth, this nation should provide a far broader range of benefits.

The approach in this legislation is admittedly much narrower. It simply asserts that refusal to provide disability benefits for pregnancy is discriminatory, and it thus requires employers to provide such benefits. This narrow approach fails to properly address the needs of women and children.

Another weakness of the proposed amendment is that it implicitly provides the same disability benefits for elective abortion as for pregnancy care and birth. There is no principle of social justice or human rights that justifies elective abortion, which currently accounts for the destruction of more than one million children each year. Nor is there a theory of civil rights that allows anyone to unilaterally take any action that violates the rights of another living human being.

The necessity to support the well being of mothers and their children, along with the concomitant necessity to protect human life, prompts us to suggest the adoption of language which would give affirmative support to both of these values and to the welfare of the family as a whole. The suggestion we propose is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 701 of title VII of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection:

"(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. Neither 'pregnancy' nor 'related medical conditions' as used in this section may be construed to include abortion."

This suggested addition is necessary to protect Church agencies from being forced by the amendment to support or provide abortion services in violation of our religious tenets and conscience convictions.

Sincerely,

Msgr. James T. McHugh
Director

AMERICAN NURSES' ASSOCIATION

Statement On

H.R. 5055, amending Title 7 of the Civil Rights Act
Providing for Disability Coverage to Pregnant Employees

April 20, 1977

To

Subcommittee on Employment Opportunities
Education and Labor Committee
U.S. House of Representatives

Title VII of the Civil Rights Act of 1964 guarantees equality of job opportunity and compensation without regard to the sex of the job applicant or job-holder. Yet the Supreme Court, in General Electric v. Gilbert held that an otherwise comprehensive employee disability benefits plan could legally exclude pregnancy benefits. The GE decision not only thwarts the basic purpose of Title VII, but also disregards the pregnant woman's accentuated need for an adequate income to insure good health for herself and for her child.

The most remarkable trend in the US labor force during the past several decades has been the increased participation of women in the labor force. During the past fifty-five years, the ranks of women workers have increased from only one out of five to two out of five of all workers. Meanwhile, the Department of Labor points out that 58% of these working women are married. The average birth rate is 1.8 children. These statistics point to an average of approximately two interruptions of the typical married woman's working life on account of pregnancy.

Loss of income on account of pregnancy - effectively closes the woman off from equal access to employment compensation, in contravention of the spirit of the Civil Rights Act.

Women, whether married or single, work out of economic necessity, and the loss of their income works a hardship of enormous magnitude. Working wives contributed about one-fourth of total family income in 1974; among women who worked full-time year round, the contribution was nearly two-fifths. Insurance schemes based upon the assumption that male incomes are the sole source of family economic security are anachronistic. Furthermore, even if all pregnant married women could count on their husbands for financial support, there would still be 16 million working women who are single, divorced or widowed, and who annually account for 10% of all births.

Insufficient income during pregnancy may impact on the health of the mother and ultimately on the child in any or all of several ways, each as undesirable as the others. Lack of pregnancy benefits restricts maternal access to vital nutrition and health care, each increasingly expensive commodities. The lack of benefits would also encourage the pregnant woman to continue working late into her pregnancy and to return to work as soon as possible after giving birth, regardless of the health and social consequences of doing so.

Although pregnancy is, for the most part, a normal physiological process, it does place the woman's body and functions into an altered state. These physiologic changes place stress on the woman which in turn can affect her energy level and health status. Her ability to maintain a healthy state is negatively influenced, unless provisions are made for the availability of rest, adequate nutrition, and prenatal care.

One of the most baffling complications which can occur to her is a premature birth. Well over fifty percent of these pre-term births have no definite cause. However, recent research both in human and animal models supports the relationship of maternal stress to premature deliveries. Additional complications which threaten the pregnancy-outcomes of both the mother and baby are diabetes, cardiac problems, toxemia, hypertension, kidney disease, etc. These complications require not only medical management, but also place severe restrictions on the woman's activity and productivity. Relevant alterations in her health status can be the ultimate result if adequate care and provisions are not made available.

Child abuse and neglect have been identified as great problems of our society. Research both past and present confirms the importance of parent-infant attachment for insuring adequate care and provision for children. The first four weeks after delivery are a crucial time for developing a healthy mother-child attachment. One of the critical elements for this development of attachment is the physical proximity of mother and child. Again, research in first animal and now human models supports the fact that with early separation, abuse and neglect of the offspring increases. Therefore it is imperative that provisions be made to insure the mother's presence with her infant, while at the same time continuing the financial support previously available to her.

Other countries long ago established compensation programs for mothers, both during and after pregnancy, to provide each mother with the time and necessary support to maintain her health status, nurture her child, and assume her new role. Certainly the statistics from these countries (i.e., Sweden, Denmark, and Holland) suggest a possible association between this practice and the improved health status of their mothers and babies.

The cost to the public can only be increased as the health of the mother and/or baby declines. A mother who is put at risk because of undesirable conditions in her environment has an increased likelihood of complications to her health, and there is equal or greater damage to the fetus. The impact of these accumulating disabilities have grave economic and humanitarian consequences for our society.

Title VII of the Civil Rights Act of 1964 as presently drafted allows employers to discriminate against working women on the basis of the normal physiological state of pregnancy. This is unacceptable, since it contravenes the spirit of the Civil Rights Act and limits the pregnant woman's access to needed nutrition and health care.

[redacted]. Our concern is for all of society and for the 900,000 registered nurses presently employed. We urge the committee to act favorably on HR 5055.

JOSEPH D. EARLY
3D DISTRICT, MASSACHUSETTS

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Congreſs of the United States
House of Representatives
Washington, D.C. 20515

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COMMITTEE:
APPROPRIATIONS

April 18, 1977

The Honorable Agustus F. Hawkins
Chairman, Subcommittee on Employment Opportunities
Room B 346A
Rayburn House Office Building

Dear Mr. Chairman:

Enclosed please find a copy of a letter to my office from the Msgr. Leo J. Battista, Diocesan Director of Catholic Charities of the Diocese of Worcester, Massachusetts, expressing opposition to H.R. 6075, a Bill to Amend the Civil Rights Act to Prohibit Sex Discrimination on the Basis of Pregnancy.

I believe the points raised by Msgr. Battista are worthy of consideration by your subcommittee during deliberations on H.R. 6075. I understand that the subcommittee held one day of hearings on April 6, and that you expect to be holding further hearings soon. I would appreciate you including Msgr. Battista's comments as part of the record at that time.

Thanking you for your consideration, I am

Sincerely,

JOSEPH D. EARLY
Member of Congress

JDE/pmf
enclosure

CATHOLIC CHARITIES OF THE DIOCESE OF WORCESTER, INC.
26 Vernon Street, Worcester, Massachusetts 01610. (617) 798-0191

March 25, 1977

The Honorable Joseph D. Early
1033 Longworth Building
Washington, D.C.

Dear Joe:

Thank you very much for forwarding to me, following my telephone conversation with Karen Lieberman of your Washington Office, the material and the "Dear Colleague" letters dealing with the area of family planning. I know that presently this bill has no number and therefore can only be referred to under that heading so that you will be familiar with the material.

The concerns that I have are the following, and I would like to share them with you so that you might more fully understand some of the ramifications of this legislation.

My concerns are twofold: (1) the language on page 2(1) (B) - "absent from work because of pregnancy disabilities on terms and conditions," etc., and on the same page (2) (B) - "incurred for medical care required for pregnancy or childbirth, or complications thereof;" and (2) the vehicle that the legislation would use is coercive; e.g., the denial of certain tax benefits.

In reference to the first: pregnancy being defined as a disability automatically incurs the responsibility to treat that disability with appropriate means; in this case, covering abortion, since abortion is an acceptable means of treating a pregnancy in current government regulations. This, of course, is due to the Supreme Court decision which gives a woman a constitutional right to choose abortion as the treatment. It would be impossible to specifically exclude abortion from this bill and have that exclusion hold up in court. Therefore, as long as the Supreme Court holds abortion as a right, we cannot afford to have pregnancy defined in our law as either disability or illness.

It might be interesting for you to know that on the state level, the tactic which will be used by the local women's rights groups will be to have the phrase, "any other termination of pregnancy" deleted from the bill, which they feel will placate the "Pro-Life element in the Legislature." However, they openly discuss among themselves that this, on fact, will not deter the coverage of abortion since once pregnancy is classified as a disability, abortion will have to be covered. Since some of the women from our state are working very closely with Congressman Drinan in order to coordinate the effort on both the state and federal levels, I feel quite sure that Congressman Drinan is fully aware of the ramifications of the bill he is presenting.

One more point on this aspect of concern. In my opinion, none of the signatories listed on pages 2 and 3 of the Hawkins letter would be there if abortion were not to be covered.

With regard to my second concern - the denial of tax benefits - although it is repugnant to me to think of pregnancy being defined as a disability or illness and losing its traditional definition of a healthful and natural state for those who sare that state, it is equally repugnant to me to think that those who challenge the traditional definition would use legislative means to do so. To further compound the insult, it would deny certain tax deductions to those employers who would refuse, due to their conscience or personal decision, to cover abortion as part of an existing health insurance or physical disability plan.

If this bill does become legislation, the burden will again be placed on employers who adhere to the principle that the unborn child has a right to live to prove that they have an obligation to refuse to adhere to the Internal Revenue Code and claim the tax deductions currently available to them.

I would be grateful for whatever help you can be to us with regard to this legislation, Joe, and will look forward to hearing from you.

With every best wish and my prayer that God will continue to bless you and your work, allow me to remain

Sincerely yours,

Msgr. Leo

(Rev. Msgr.) Leo J. Battista
Diocesan Director

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April 14, 1977

The Honorable Augustus S. Hawkins
House Office Building
Washington, D.C. 20515

Dear Congressman Hawkins: S-995

I am writing to you as a Congressman from my state, albeit not from my district.

RECEIVE
APR 18 '77

Recent releases from the press indicate that you are one of the sponsors of S-955 which would circumvent the recent Supreme Court decision on mandatory maternity benefits. As I understand your bill you would require employers providing health and disability plans to include coverage of normal maternity on a mandatory basis.

As a professional in the employee benefit industry I would like to register my very strong objections to your bill. Certainly it is well intentioned and I am sure looking at this from the standpoint of working female employees and dependent wives it probably appears as though an area of discrimination exists which should be corrected by legislative action.

However, there is another side to the story. As I prepared to write to you with my own views I came across the enclosed article from one of our trade magazines which seems to tell the other side so clearly and logically it probably will be totally ignored. However, as one who is involved in this problem and a sponsor of legislation I hope you will take a few minutes to read the article and hopefully you will appreciate why some people feel just as strongly that the GE decision should stand.

What will happen in my opinion is that if maternity benefits are mandated you will simply further impede the growth of employee benefit plans in areas which probably are more important. For example, an employer who provides a liberal health plan and faces the two-fold cost impact of a substantial rate increase because of the continuing escalation in the cost of health care and the added burden of a mandatory maternity coverage is simply not going to be receptive to adding additional benefit plans which would be of value to his entire employee population. As Mr. Downes states in the article, "the American businessman may pay the insurance bill but it is John Doe, his customer, who will put up the money. There was never yet an employee benefit that was not paid for by the consumer ar large and maternity benefits would be no exception".

Misguided legislative efforts have brought chaos to the employee benefit industry in recent years. One such example is the Employee Retirement Income Security Act (ERISA) which, while well-intentioned, has probably done more to impede the growth and progress of retirement plans than any other factor in the history of their development. In my opinion, mandatory maternity benefits would be another step in the same direction.

Very truly yours,

M. P. Stuart

Marshall P. Stuart
Vice President

MPS/ch
Enclosure

SPEAKING OUT

Pregnancy disability pay is coming—eventually

By Peter Downes
Manager of Insurance
American Trading & Production Corp.
Baltimore, Md.

FOLLOWING THE recent Supreme Court decision that private employers may refuse sick pay for pregnancy related disabilities, a rash of editorials and commentaries have appeared. Such an editorial was recently published by Ms. Bernice Malamud, who among other things is a member of the New York State Insurance Advisory Board and of the National Task Force on Discrimination in Insurance. Ms. Malamud likened the decision to the Dred Scott case which overturned Congressional attempts in the 1850s to limit slavery.

Like others in my trade, I have pondered the G. E. decision and I intend to express a few thoughts on the subject. For it seems to me that people who argue on either side of the case have studiously avoided saying a few things out loud.

The first important point is that in the District of Columbia and 45 of the United States or thereabouts, sickness disability is still a voluntary program. The exceptions are California, Hawaii, New Jersey, New York and Rhode Island. Regardless for the moment of the content of any disability programs, many employers outside the compulsory states can solve any problem of discrimination by dispensing with any kind of disability program. This, of course, is not true of every employer since many are locked into programs negotiated under union contracts. These programs in the absence of legislation to the contrary will still be voluntary in nature in that their content may include anything the employer agrees to finance and the union agrees to accept.

Here then is an illogical situation. If it is discriminatory to exclude maternity benefits from a program, is it not more discriminatory to deprive some women from participating in any kind of program? This would not arise in New York, for example, where the state disability program stipulates that there shall be a minimum level of benefits available to all. But in Texas, to pick a state at random, one might see Mrs. Johnson receiving a benefit because she worked for the right employer whereas Mrs. James, her next door neighbor, might not receive anything. Or, as George Orwell said, "all animals are equal, but some are more equal than others."

This argument is based on the premise put forward by Ms. Malamud that the payment of pregnancy related disability benefits is a human right. If it is indeed a right to receive such benefits, then there is also a corresponding duty owed by somebody to pay for those benefits. Ms. Malamud says that this duty belongs to American business, pointing out that a reverse decision in the G. E. case would have cost as much as $1.3 billion in insurance costs and perhaps much more. This presumably is an annual cost.

This argument fails to mention what the textbooks used to call the incidence of taxation. The American businessman may pay the insurance bill but it is John Doe, his customer, who will put up the money. There was never yet an employe benefit that was not paid for by the consumer at large and maternity benefits would be no exception. If then the $1.3 billion figure is correct, and assuming a 200-million population figure, to pay for such a benefit would require from the John Does of this country an involuntary tax at a rate of $6.50 per capita per annum. The actual amount paid by each John Doe would, of course, depend on the actual expenditure of each member of the population at large. To pursue the argument of Ms. Malamud to its logical conclusion, therefore, she is saying in effect that the entire population of the United States has the duty to pay a tax to provide maternity benefits to the mothers of all children born in the United States.

I believe these arguments to be cogent. By this I do not mean that I am arguing that disability plans should or should not include pregnancy benefits but rather that within the political processes of the U.S. a decision will sooner or later have to be made as to whether such a benefit is in fact a human right and whether the population at large has the duty of paying for this right. Ms. Malamud has concluded that it is such a right but sadly recognizes, nevertheless, that Title VII of the Civil Rights Act must be changed to put the matter beyond doubt.

To my mind just about everything else in connection with the G. E. case is irrelevant. It does not matter what other benefits the plan includes whether they be male-oriented or otherwise. Such plans may include vasectomy, prostatectomy, circumcision, mastectomy, hysterectomy and tubal ligation, but the inclusion of these benefits has nothing to do with human rights per se. They are merely surgical processes which may apply to one sex or the other, and in relation to non-statutory plans may be included or excluded at will. Indeed, one readily concedes that if compulsory payment of maternity benefits gives rise to involuntary taxation, then the inclusion of any other benefit in a plan gives rise to a public contribution which in practice is no less involuntary.

Notwithstanding the G. E. decision, the matter is by no means done with. The G. E. decision may delay matters by some years, but if a substantial proportion of public opinion decides that maternity benefits are what it wants, then it will find a way to get them. The British and Canadians, just to mention two examples, faced up to similar problems some years ago. In Canada, a monthly benefit payable until a child's sixth birthday was paid to every child born except the first. The amount received was declared as income so that it became, in fact, part of a graduated tax. Those with a small income paid little or no tax and thus received a smaller actual benefit or none at all.

Again, I am not saying that this is the right way to do things but merely illustrate the way in which such a matter has been handled outside the U.S., whether by way of children's allowances or maternity benefits. For my own part, I do not believe the question of human rights enters into the matter at all but that what is involved is simply a social decision. Proponents of maternity benefits are, in fact, simply members of a movement struggling to change U.S. social structure.

To summarize, we have on the one hand the supporters of the status quo who say that with the possible exception of certain state plans, disability programs are voluntary in nature and benefits may be negotiated, granted or withheld at will. It is likewise pointed out that pregnancies themselves represent a voluntary decision and thus it is the responsibility of the parents to finance the birth. Financial considerations play a significant role.

Opponents of this point of view say that life is not like that at all and that at best these arguments are outmoded. Notwithstanding ZPG groups and their ilk, babies will still be born. However, a significant portion of the working population is dependent solely on its wages and it is socially desirable for these workers to maintain whatever economic status they may possess and not see it damaged when giving birth to children. To this end, it may be argued that to avoid discrimination maternity benefits must become available to all and the population at large must be coerced into financing them.

Viewing the history of the United States during the past 50 years, I think that it will be only a matter of time before benefits will be made available—but just how much time I do not know. ■

TESTIMONY ON BEHALF OF
the
NATIONAL COMMISSION ON THE OBSERVANCE OF
INTERNATIONAL WOMEN'S YEAR, 1975

BY:

Bella S. Abzug
Presiding Officer

Draft Testimony: Pregnancy Bill H.R. 5055

The purpose of this legislation is to make clear that Title VII's prohibition against discrimination on the basis of sex encompasses discrimination on the basis of pregnancy. To many of us that proposition is self-evident. To the all-male United States Supreme Court it was not.

The number of ways in which women have been denied job opportunities based solely on their reproductive capacities is shocking and demands redress. In the early days of interpreting Title VII, the courts confronted numerous state protective labor laws[1/] which limited the number of hours a woman could work or the amount of weight she could lift. These laws were based upon stereotyped characterizations of women as being justifiably limited in their job opportunities because of their procreative roles. These so-called protective laws were exposed as often "protecting" the better paying jobs for men, and have been struck down by the courts as being violative of the egalitarian principles embodied in Title VII.

[1/] *Rosenfeld v. Southern Pacific Railroad*, 444 F.2d 1219 (9th Cir. 1971); *Weeks v. Southern Bell Telephone Co.*, 467 F.2d 95 (5th Cir. 1972); *Manning v. General Motors Corp.*, ___ F.2d ___, 3 FEP Cases 968 (N.D. Ohio 1971); *Kober v. Westinghouse Electric Corp.*, 325 F.Supp. 467 (W.D. Pa. 1971).

It is revealing that the only Supreme Court Title VII sex discrimination opinion, prior to its decision in Gilbert v. General Electric, ___U.S. ___, 13 FEP Cases 1657 (December 7, 1976), also focuses on an employment policy of limiting women's employment opportunities based upon stereotypes of their maternal role being incompatible with employment opportunity. In Phillips v. Martin Marietta, 400 U.S. 542 (1971), the employer theorized, without showing any factual basis for such belief, that women who are mothers of preschool age children may be unreliable as employees and can therefore be denied employment.[2/]

Today, more than a decade after the passage of Title VII, women continue to suffer discrimination in employment because of their reproductive roles. Women are denied jobs or hired into less responsible positions because they may become pregnant.[3/]

[2/] The Supreme Court found this policy unlawful since the employer's assumptions were unsupported by any evidence. As Justice Marshall noted in his separate concurrence, stereotypes of the appropriate domestic roles of the sexes, although deeply rooted, cannot be allowed to dictate women's employment opportunities. See also Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971), where the Court rejected an employer's argument that it was permissible not to employ married women as flight attendants on the ground that their husbands may object to their travel schedules.

[3/] Wetzel v. Liberty Mutual, 511 F.2d 199 (3rd Cir. 1975).

Once employed, women who become pregnant are often forced on unpaid leave at some arbitrary point prior to the onset of labor.[4] The effect of such a mandatory maternity leave policy is to force a woman who is willing and able to work, and who desperately needs her income, to forego wages[5] for months. The record in Gilbert v. General Electric amply illustrates the extended economic hardship caused by such employment policies. G.E. forced its pregnant employees on unpaid maternity leave at six months of pregnancy and refused to reinstate them for a period of eight weeks following delivery, although the women sought reinstatement and produced medical certification of their ability to work. Thus, the pregnant employee was forced to endure five months of lost income. Pregnant women are also often forced by their employers to endure diminished or non-existent fringe benefits in terms of hospitalization

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4/ Gilbert v. General Electric, ___ U.S. ___, 13 FEP Cases 1657 (1976); Wetzel v. Liberty Mutual, 511 F.2d 199 (3rd Cir. 1976); Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir. 1975), cert. granted, ___ U.S. ___, 1976; LaFleur v. Cleveland Board of Education, 414 U.S. 632 (1974).

5/ Gilbert v. General Electric, supra; Wetzel v. Liberty Mutual, supra.

and sick pay.[6] These substantial benefits are denied pregnant women although they are rountinely made available to all other employees who experience any other kind of disability, whether that disability arises as the result of an athletic injury or cosmetic surgery. Some employers go so far as to withdraw all acumulated seniority credit from an employee who goes on leave to give birth to her child, so that she returns to employment, if a vacancy is available, as a new employee without the protection of accrued competitive seniority. The effect of this kind of employment policy in a declining economy is often to terminate the employee.[7] This forced disruption in continuity of employment has lasting and devastating implications for a woman's lifetime earnings capacity. Women suffering complications of pregnancy are sometimes discharged by their employers, unlike employees experiencing any other kind of medical complication[8]

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[6] *Gilbert v. General Electric*, ___U.S. ___, 13 FEP Cases 1657 (1976); *Wetzel v. Liberty Mutual*, 511 F.2d 199 (3rd Cir. 1976); *Hutchison v. Lake Oswego School District No. 7*, 519 F.2d 961 (9th Cir. 1975), *remanded* ___ U.S. ___ (1976).

[7] *Satty v. Nashville Gas Co.*, 522 F.2d 850, (6th Cir. 1975), *cert. granted*, ___U.S. ___ (1976).

[8] *Holthaus v. Compton*, 514 F.2d 651 (8th Cir. 1975).

Pregnant women who are discriminatorily forced off their jobs by one employer are often unable to secure new employment. Until very recently pregnant women have been unable even to obtain unemployment compensation on the theory that pregnancy is, in and of itself, irrebutable proof of a woman's unaavailability for employment.[9/]

These are only a few of the more blatant examples of discriminatory employment practices which are imposed on women because of their childbearing function. The more subtle and therefore more insidious practices, such as hiring women into less responsible and low paid positions based on assumptions that women, because they are mothers or, may yet become mothers, and are therefore assumed to be less career-oriented, take an incalculable psychological and economic toll on the American working woman, whether her workplace is the executive board room or the assembly line.

By this legislation Congress will make clear that the mere fact that the childbearing function is unique to women in no way justifies burdening women with the numerous employment policies detailed above, which have historically denied women

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9/ Turner v. Department of Employment Security, 423 U.S. 44 (1975).

employment opportunities. In enacting Title VII, Congress never intended that employers could force women to trade off their cherished and constitutionally protected right to bear children as a condition for enjoying the statutory protections embodied in Title VII.[10/] This legislation, by making explicit what Congress believed was already covered by its passage of Title VII, will insure that such a distorted result can never again be reached through judicial misinterpretation.

The importance of insuring that women are not discriminated against workers merely because they are also childbearers is underscored by today's economic realities. The husband and wife breadwinner family is rapidly becoming the norm. 1973 data shows that the husband was the only earner in less than three out of eight husband-wife families.[11/] Today's harsh economic realities have reduced the percentage of husband-only earners dramatically.

[10/] Skinner v. Oklahoma, 316 U.S. 535; Roe v. Wade, 410 U.S. 113 (1973); Buckley v. Coyle Public School System, 476 F.2d 92 (10th Cir. 1973).

[11/] Source: U.S. Department of Commerce, Bureau of the Census, cited in 1975 Handbook on Women Workers, U.S. Dept. of Labor, Chart O, p. 139 (1975).

An even more dramatic illustration of economic need can be seen in the growing percentage of families headed by women, who can ill-afford disruption in their earnings for themselves and their children. In 1973 about 6.6 million families, or 12 percent of all families in the United States, were headed by women. The median income of these families was $5,797 per year.12/

A related area of concern is the number of families living in poverty. In 1973, families headed by women were 12 percent of all families, but they constituted 45 percent of all low-income families.13/

12/ Source: 1975 Handbook on Women Workers, U.S. Dept. of Labor, Bulletin 297, p. 140.

13/ In 1973 the income level which separated "poor" from "nonpoor" was $4,540 for a non-farm family of four. Source: 1975 Handbook on Women Workers, U.S. Dept. of Labor, Bulletin 297, p. 141.

In conclusion, Mr. Chairman, it is clear that if working women in America, who desperately need their income, are to be protected by Title VII, then their employment rights must be protected when they are pregnant. This legislation will ensure that result. Thank you.

Statement
of
Odessa Komer, Vice President
United Automobile, Aerospace and Agricultural Implement
Workers of America, UAW
to the
House Education and Labor Subcommittee on
Employment Opportunities
Hearings on H.R. 6075

April 6, 1977

MR. CHAIRMAN: My name is Odessa Komer. I am a Vice President of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. The UAW represents approximately 1,400,000 members in the United States and Canada. Women comprise an important and growing percentage of our membership. We welcome this opportunity to present our views on proposed legislation which is vital to women workers in this country.

The UAW has long called for and worked toward an end to employment discrimination on the basis of sex. A central form of sex discrimination is employers' disparaic treatment of women workers on the basis of pregnancy and childbirth. Unfortunately, the Supreme Court of the United States has not understood this, and has forced us, along with the other labor unions, to seek legislation which will overturn their decision in General Electric v. Gilbert. While that decision ruled only that an employer did not violate section 703(a)(1) of Title VII by excluding pregnancy disabilities from the risks its disability insurance income plan covered, the potential reach of the decision is dangerously broader. We do not want to wait for the Supreme Court to assure us that it is unlawful to refuse to hire a woman because she might become pregnant, or to fire her once she does.

The UAW wants an end now to all forms of discrimination on the basis of sex, and we believe this bill is an important step toward achieving that goal. This bill gives Congress the opportunity to clarify that in Title VII it meant to ban sex discrimination in employment not just when women act like men, but also when they experience the bilogical process that differentiates them from men as well. Most disability insurance plans already cover disabilities unique to the male reproductive system, such as prostatectomies, vasectomies and circumcisions.

Pregnant workers and workers who are new mothers are, fundamentally, workers. They should not be relegated to second class citizenship in employee rights or benefits. When they are disabled, we believe they should be treated just like other temporarily disabled workers. And when they are healthy, they should be treated just like other healthy workers. This is the very meaning on nondiscrimination.

But employers would rather set pregnant women and new mothers aside in a separate category which often strips them of their rights to full employee status and the fringe benefits that status may bring. This segregation on the basis of pregnancy and childbirth rests on unrealistic, nineteenth-century stereotypes of women. It is blatantly unjust for an employer to force a pregnant woman out of work and then deny her fringe benefits which would otherwise cover her when she is disabled, just at a time when family expenses for the new baby are mounting. These forms of discrimination must stop if we are ever to see a day of equal employment opportunity in this country.

On the pregnancy disability pay issue, opponents of this bill make predictions of a crushing cost burden on employers. They also claim that women employees will malinger after childbirth in effect to get a paid maternity leave through disability pay. Both fears are baseless and merely mask stereotypes about women workers.

In our own collective bargaining efforts, the UAW has negotiated with many smaller employers to gain coverage in its sickness and accident plans for pregnancy disability which is identical to coverage provided for other temporary disabilities. A few examples include our agreements with CTS Corporation, Wheelhorse Corporation, Design and Manufacturing Corp., South Bend Plastics, Arvin Industries and Eltra Corporation. These are typical American companies which supply vehicle parts; they are not the giants of industry. Nonetheless, like many other companies, they have been able to include full pregnancy disability coverage without financial difficulties. They have found the cost to be an inconsequential part of the employee benefits package, even where women of childbearing age are a very large portion of the workforce.

Similarly, the UAW estimates that changing pregnancy disability coverage from the current six weeks maximum coverage which now exists in many of our contracts, including those with Chrysler, Ford and General Motors, to full coverage would require only slight increases in employer contributions. In short, the economic debacle predicted by industry is not supported by actual costs as already experienced by some companies and as actuarially predicted for others. The huge cost predictions by the bill's opponents also apparently ignore the steadily declining birth rate and the delay of many women to enter employment until after they have borne all their children.

The charge that women employees would abuse pregnancy disability and malinger after they have recovered is also without foundation, and fundamentally insults women workers. To collect disability pay for any temporary disability, an employee must in fact be disabled. Often, as in many UAW contracts, the employer requires vertification of the employee's own doctor's conclusion of disability. If the personal physician and the company physician disagree, the dispute is resolved by an independent third medical opinion. The system thus has built-in safeguards against malingering for any type of disability, but it due to pregnancy or to back muscles being wrenched.

The concern for malingering on pregnancy disability really boils down to a perpetuation of unjust stereotypes about women workers. It is bottomed on the assumption that women workers are not really serious participants in the labor force. Women who are treated as full participants in the workforce rather than as second-class employees will react and respond as full participants. Polaroid Corporation, for example, reported a marked increase in the rate of return to work among women employees after they began covering pregnancy disability just like any other temporary disability.

In exchange for their equal efforts, women employees should be entitled to equal rewards. Those rewards must include treatment of pregnancy disability just as any other temporary disability, without reducing the other fringe benefits guaranteed under contract. 1/ For this reason, the UAW urges that the House retain the portion of this bill which will protect workers' other fringe benefits once this measure becomes law.

The UAW urges passage of this legislation not just for the important purposes of disability pay, but for eliminating discrimination on the basis of pregnancy for all employment-related purposes as well. While not addressing every employment discrimination ill in society, this bill is a key tool for wiping out sex discrimination on the job. In the interests of equal job rights for all workers in America, the UAW urges quick passage of H.R. 6075.

1/ A suggestion has been made that an addition to the bill assuring that no employee's fringe benefits will be reduced as a consequence of compliance with this legislation would be an unconstitutional impairment of contract. If this claim were true, laws enacted by Congress calling for a minimum wage, equal pay, minimum pension plan standards and many other employment standards statutes would also have been declared unconstitutional long ago.

TENO RONCALIO
THE STATE OF WYOMING

[illegible]

Congress of the United States
House of Representatives
Washington, D.C. 20515

COMMITTEES:
INTERIOR AND INSULAR AFFAIRS

PUBLIC WORKS AND
TRANSPORTATION

JOINT COMMITTEE ON ATOMIC
ENERGY

CHAIRMAN
SUBCOMMITTEE ON AGREEMENTS FOR
COOPERATION

April 4, 1977

The Honorable Augustus F. Hawkins
Chairman
Subcommittee on Employment Opportunities
B 346A, Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

I write in support of H. R. 5055, a bill to prohibit sex discrimination on the basis of pregnancy. I have enclosed a copy of a letter that I received from Thyra Thomson, the Secretary of State for my State of Wyoming.

As your Subcommittee is now considering this legislation, I thought that you would be interested in considering Ms. Thomson's sound reasoning, and would also enjoy noting that her letter is a fine example of Emily Dickinson's superb concept that "brevity is the soul of wit."

Thank you for your kind consideration of the Secretary's remarks. I hope that they will be of some help to you and the Members of the Subcommittee.

Respectfully yours,

Teno Roncalio
Congressman for Wyoming

TR/kw
Encl.

Secretary of State • State of Wyoming

THYRA THOMSON
Secretary of State

LINDA MOSLEY
Deputy

CHEYENNE
82002
(307) 777-7378
Corporations (307) 777-7370

March 16, 1977

The Honorable Teno Roncalio
U.S. Representative from Wyoming
1314 Longworth House Office Bldg.
Washington, D.C. 20515

Dear Teno:

I hope you will support the Senate legislation making it discriminatory to deny sick leave and health care benefits for pregnancy.

Bearing a child is as deserving of employer consideration as a male leg broken on a ski slope.

Sincerely yours,

Thyra

Thyra Thomson
Secretary of State

TT/lw

Haggar Co.,
Dallas, Tex., April 28, 1977.

Dear Mr. Hawkins: I see where you have introduced legislation which would require employers to cover pregnancy on the same basis as other illnesses and disability benefit plans. Please tell me what right you have to tell us what kind of disability policy we must provide our employees. I don't believe you are picking up the tab for the premium nor is the United States government.

What purpose do you gain by forcing employees to increase the cost of doing business and thus increasing the cost of products to the consumer. You are certainly not going to help the economy by continuously adding to the burden of running a business.

You should be spending your time trying to find ways of reducing the cost of government and eliminating bureaucracy which is choking this nation. Most of us want to live in a free society, not one which is controlled by federal bureaucrats.

Yours truly,

H. F. Tehan.

Findley, Davies and Co.,
April 28, 1977.

Hon. August F. Hawkins,
House of Representatives,
Washington, D.C.

Dear Representative Hawkins: I am writing in regard to a proposed amendment to Title VII of the 1964 Civil Rights Act. This amendment would provide that the exclusion of pregnancy-related conditions from disability benefit plans would constitute sex discrimination under the Act.

By this letter I am whole heartily encouraging your negative response to this amendment. The provisions of the disability programs with which we are involved either negotiated or voluntarily purchased by companies are an attempt to provide income benefits to employee participants to replace their income as a result of either an accident or a sickness. In today's world by almost any measure, the bringing to birth of a child is a voluntary decision on the part of the mother. One of the chief problems we have in our country, and in fact in the world, is an increasing population beyond our capacity to provide for them. It would certainly seem counter-productive for our government to insist on compensation being paid almost as a reward for conception. Our nation has by too many means already provided economic encouragement for people to bring into life babies that are neither wanted not able to be supported by their parents. Certainly, this is one additional way which is not necessary to encourage this occurrence.

The use of the word discrimination has almost endless ramifications. Each of us could view something which occurs to us during the course of our normal lives to have been an act of discrimination against us, either by other individuals or by government. We must stop the compensation of those who would rather survive by complaining than by hard work.

To pay "disability" income for an occurrence which is neither an accident (in the normal sense) nor an illness is providing specific legislation or compensation to a specific group as a means of appeasement. Please use your good offices to prohibit this occurrence. I remain,

Sincerely,

Findley, Davies and Co.,
By John W. Davies, Jr.

Statement of American Retail Federation on H.R. 5055

This statement is submitted on H.R. 5055, a bill "to prohibit sex discrimination on the basis of pregnancy," including employee ineligibility for disability benefits.

The American Retail Federation is made up of state retail associations in all 50 states and the District of Columbia, and 31 national retail associations. Through these affiliates the Federation represents over a million stores, employing 13,000,000 persons, out of a total of over 14,000,000 employed in all of retailing.

At the outset, we should point out that our retailer members are particularly concerned with the effects of this legislation because retailing is a segment of the economy which employs an exceptionally large number and percentage of female employees. Department of Labor figures indicate that, as of July, 1976, 6.2 million women were employed by retailers. This figure represents almost half of the total retail work force. In the case of some of our members, the percentage of female employees is considerably higher, frequently in the area of 65%–75%. This factor must be considered in connection with the fact that retailing is a heavily labor-intensive sector of the economy. The result is that the costs of employee benefit programs have a greater impact on retailers than on other industries.

ARF supports the principle of non-discrimination on the basis of sex in all areas of employment. We believe that any legislation designed to accomplish this goal must not unduly deprive employers of the right to design benefit plans which allocate the funds available for fringe benefit programs in such a fashion as to provide all employees with benefits most needed by them.

We do not believe the H.R. 5055 would allow an employer to do this. By requiring all plans—even those which are structured so as to provide only limited benefits—to include coverage for pregnancy, childbirth, and related conditions, the bill would deprive an employer and his employees of their right to structure a benefit plan which contains only those features deemed most essential for the protection of all employees.

H.R. 5055, as presently drafted, could result in forms of discrimination against other employees, men and women, who are not its intended beneficiaries and, in some cases, could have an effect on child-bearing employees, which is the opposite of its presumptive goal. By regarding pregnancy and childbirth as disabilities, and by prohibiting distinctions on the basis of these "disabilities," the bill could be read as prohibiting employment practices which provide pregnant women or new mothers with benefits not available to other employees. For example, many of our retailer members' medical plans provide benefits only for catastrophic illnesses and non-elective surgery, but make an exception to this general limitation by providing medical payments for maternity costs. If such employers are required to treat pregnant workers no differently than others, this exception, from the perspective of non-pregnant workers, would be viewed as discriminatory. Similarly, some of our members allow women employees who have children to take leaves of absence for periods ranging up to one year after the birth of their child with no requirement that such employees show that the leave is medically necessary. A denial of this benefit to other employees who have not themselves given birth would be viewed as a discriminatory practice made solely "on the basis of sex" (i.e. pregnancy) under H.R. 5055. Moreover, the bill, according to some proponents, would require that when the employee returns from her leave of absence, she would be entitled to the same salary, seniority, vacation, retirement, and other benefits as fellow employees who had continued to work, a fact which such employees might challenge if that privilege were not extended to all workers.[1]

In short, ARF regards H.R. 5055 as a hastily-drawn solution to a problem which should be studied further. We are concerned that inadequate attention has been paid to the economic and competitive impact of this legislation on industries like retailing which stand to be most heavily affected by its requirements. We are concerned that too little consideration has been given to the medical, actuarial, and statistical factors which underlie the reluctance of many employers to provide coverage for pregnancy-related conditions. While there was testimony before the subcommittee that the average disability period for pregnant workers is 6 to 8 weeks, no explanation for this figure has been provided, nor has the effect of a statute which, in many cases, would mandate extended paid leaves, been assessed. It is not unlikely that workers' and physicians' views as to the length of a "disability" will be colored by their awareness that the worker continues to be paid during the disability period. The recent experience of one of our members bears this out. In the month following a state court decision requiring employers to include pregnancy coverage in disability plans, that employer received five applications for maternity disability pay. The shortest period of disability claimed was thirteen weeks. The longest was nine months.

We believe that Congress should consider whether the problem which H.R. 5055 seeks to address (which the bill views as a discrimination problem, although the Supreme Court in *General Electric* v. *Gilbert*, 45 U.S.L. W. 4031, expressly held to the contrary) could not be more properly addressed through programs designed to provide incentives to coverage for pregnancy benefits in all plans, rather than prohibitions aimed only against plans which do not have such coverage.

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[1] Section 2 of H.R. 5055 would arguably prohibit an employer from deleting such additional benefits from his benefit plan in order to comply with Section 1.

ARF urges the Subcommittee to schedule additional hearings on H.R. 5055, allowing retailers and others to gather documentation on these matters which was not previously assembled due to the short time between the introduction of the bill and the hearings held on it. Representatives of ARF would welcome the opportunity to discuss all aspects of this legislation with the Subcommittee and its staff.

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